



**REPORT  
OF THE  
INTERNATIONAL LAW  
COMMISSION**

**Covering the work of its fifth session  
1 June—14 August 1953**

**GENERAL ASSEMBLY  
OFFICIAL RECORDS: EIGHTH SESSION  
SUPPLEMENT No. 9 (A/2456)**

**NEW YORK, 1953**

**UNITED NATIONS**

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## NOTE

All United Nations documents are designated by symbols, capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

## Chapter I

### INTRODUCTION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947 and in accordance with the Statute of the Commission annexed thereto, held its fifth session at Geneva, Switzerland, from 1 June to 14 August 1953. The work of the Commission during the session is related in the present report which is submitted to the General Assembly.

#### I. MEMBERSHIP AND ATTENDANCE

2. The Commission consists of the following members:

<i>Name</i>	<i>Nationality</i>
Mr. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr. Roberto Córdova	Mexico
Mr. J. P. A. François	Netherlands
Mr. Shuhsi Hsu	China
Mr. Manley O. Hudson	United States of America
Faris Bey el-Khoury	Syria
Mr. F. I. Kozhevnikov	Union of Soviet Socialist Republics
Mr. H. Lauterpacht	United Kingdom of Great Britain and Northern Ireland
Mr. Rabhabinod Pal	India
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Jean Spiropoulos	Greece
Mr. J. M. Yepes	Colombia
Mr. Jaroslav Zourek	Czechoslovakia

3. With the exception of Mr. Manley O. Hudson, who for reasons of health was unable to attend, all the members of the Commission were present at the fifth session. Mr. Córdova attended the meetings of the Commission from 22 June, Mr. Spiropoulos from 10 June to 8 August. Mr. Pal ceased to attend meetings after 16 July, and Mr. Hsu after 11 August.

#### II. OFFICERS

4. At its meeting on 1 June 1953, the Commission elected the following officers:

*Chairman:* Mr. J. P. A. François;  
*First Vice-Chairman:* Mr. Gilberto Amado;

*Second Vice-Chairman:* Mr. F. I. Kozhevnikov;  
*Rapporteur:* Mr. H. Lauterpacht.

5. Mr. Yuen-li Liang, Director of the Division for the Development and Codification of International Law, represented the Secretary-General and acted as Secretary of the Commission.

#### III. AGENDA

6. The Commission adopted an agenda for the fifth session consisting of the following items:

- (1) Arbitral procedure
- (2) Régime of the high seas
- (3) Régime of the territorial sea
- (4) Law of treaties
- (5) Nationality including statelessness
- (6) Draft code of offences against the peace and security of mankind
- (7) Request of the General Assembly concerning the codification of the topic "diplomatic intercourse and immunities"
- (8) Date and place of the sixth session
- (9) Ways and means of providing for the expression of dissenting opinions in the report of the Commission covering the work of each session
- (10) Other business

7. In the course of the session the Commission held fifty-seven meetings. It considered the items on the agenda, with the exception of the régime of the territorial sea (item 3) and the law of treaties (item 4). The documents submitted to the Commission regarding item 3, namely, "Second report on the Régime of the Territorial Sea" (A/CN.4/61 and A/CN.4/61/Add.1) by Mr. François, special rapporteur, and "Information and Observations submitted by Governments regarding the Question of the Delimitation of the Territorial Sea of Two Adjacent States" (A/CN.4/71 and A/CN.4/71/Add.1), compiled by the Secretariat, as well as the document pertaining to item 4 "Report on the Law of Treaties" (A/CN.4/63) by Mr. Lauterpacht, special rapporteur, were held over for consideration at the next session.

8. The work on the questions dealt with by the Commission is summarized in chapters II to V of the present report.

## Chapter II

### ARBITRAL PROCEDURE

#### I. INTRODUCTORY

9. At its first session in 1949, the International Law Commission selected arbitral procedure as one of the topics of codification of international law and appointed Mr. Georges Scelle as special rapporteur. The successive stages of the preparation and discussion of that topic are set forth in paragraphs 11-14 of the report of the Commission on its fourth session.<sup>1</sup>

10. At its fourth session in 1952, the Commission adopted a "draft on arbitral procedure" with accompanying comment.<sup>2</sup> In accordance with article 21, paragraph 2, of its Statute, the Commission decided to transmit the draft, through the Secretary-General, to the governments with the request that they should submit their comments. The Commission also decided to draw up, during its fifth session in 1953, a final draft for submission to the General Assembly in accordance with article 22 of its Statute.

11. Up to the time of the meeting of the Commission on 1 June 1953, comments were received from the Governments of the following countries: Argentina, Belgium, Brazil, Chile, India, the Netherlands, Norway, Sweden, the United Kingdom of Great Britain and Northern Ireland and the United States of America.<sup>3</sup> An acknowledgment of the great value of these comments, as well as some observations relevant thereto, are contained below in paragraphs 30 *et seq.*, of the present report. The comments will be found in Annex I to the report.

12. During its fifth session in 1953, the Commission at its 185th to 194th meetings considered the draft in the light of the comments of governments and of the study of the provisional draft by its members in the intervening period between the fourth and fifth sessions. As the result, the Commission adopted a number of substantial changes which are commented upon in the present report. No reference is made to verbal changes and alterations in drafting.

13. The Commission was greatly aided in its work during the fifth session by the detailed commentary prepared by the Secretariat in accordance with a decision taken at the fourth session by reference to article 20 of the Statute. In the opinion of the Commission that commentary, which contains an account and analysis of the existing practice in the matter of arbitral procedure and of available jurisprudence and doctrine, constitutes a valuable contribution to the study and the application of the law of arbitral procedure. It is also the view of

<sup>1</sup> See the report of the International Law Commission covering the work of its fourth session, *Official Records of the General Assembly, Seventh Session, Supplement No. 9*, document A/2163, paragraphs 11-14.

<sup>2</sup> *Ibid.*, paragraph 24.

<sup>3</sup> The Government of Uruguay transmitted to the Commission the comments of the Faculty of Law and Social Sciences in Montevideo and of the Uruguayan Institute of International Law. These comments were received too late to be taken into consideration.

the Commission that, after being revised and supplemented by the Secretariat in the light of the decisions taken by the Commission at its fifth session, the commentary should be published.

14. The term "arbitral procedure" as used in the title of the draft (see paragraph 57) refers to arbitral procedure in its wider sense, i.e., provisions for safeguarding the effectiveness of arbitration engagements accepted by the parties, as well as clauses relating to the constitution and powers of the tribunal, the general rules of evidence and procedure, and the award of the arbitrators. The Commission did not consider it necessary to frame detailed rules of procedure on the lines of those embodied, for instance, in the Rules of the International Court of Justice. Such detailed rules of procedure are liable to vary according to the circumstances of each arbitration. On the other hand, it is probable that the parties may find it useful in some cases to have before them a collection of rules of arbitral procedure in the more limited and technical sense of the term. The Commission considers it desirable that the commentary to be prepared by the Secretariat and referred to in paragraph 13 above should contain as an annex a collection of rules of arbitral procedure in the sense just mentioned.

#### II. THE OBJECT AND NATURE OF THE DRAFT ON ARBITRAL PROCEDURE

15. The present draft on arbitral procedure has a dual aspect. While in some matters, which are of a fundamental nature, it does no more than codify the existing law of international arbitration, in other respects its provisions are in the nature of a formulation, *de lege ferenda*, of what the Commission considers to be desirable developments in this field of arbitral procedure. The Statute of the Commission clearly envisages, and regulates separately, these two functions. This does not mean that these two functions can be invariably—or even normally—kept apart in the drafts prepared by the Commission. In the case of some topics it may be possible to limit the function of the Commission to one or the other of these two fields of its activity. In the case of other topics these two functions must be combined if the Commission is to fulfil its dual task of, in the language of Article 13 of the Charter of the United Nations, "progressive development of international law and its codification". At the same time the Commission considers it of utmost importance that the difference between these two aspects of its activity should be constantly borne in mind.

#### A

##### *Codification of the law of arbitral procedure*

16. The Commission considers that, with regard to the basic features of the law of arbitral procedure, the present draft is no more than a codification of existing law.

According to established law and practice, international arbitration is a procedure for the settlement of disputes between States by a binding award on the basis of law and as the result of an undertaking voluntarily accepted. It is also of the essence of the traditional law of arbitral procedure, fully maintained in the present draft, that the arbitrators chosen should be either freely selected by the parties or, at least, that the parties should have been given the opportunity of a free choice of arbitrators. The same principle of free determination by the parties applies to the competence of the arbitral tribunal, the law to be applied and the procedure to be followed by the tribunal.

17. All these features of the traditional law of arbitral procedure have been preserved in the present draft. Thus, article 1 of the draft lays down that the obligation to arbitrate results from an undertaking voluntarily accepted by the parties. Article 3, paragraph 1, and article 4 expressly embody the principle that, in the first instance, the tribunal must be constituted by the parties. Article 6 reaffirms that principle in the case of all vacancies for which the parties are not responsible. Articles 9 and 10 safeguard for the parties the right to determine by agreement the powers and the procedure of the tribunal. Article 12 gives expression to the principle that, in the absence of special rules agreed upon by the parties, the law to be applied by the arbitral tribunal is identical with the law administered by the International Court of Justice by virtue of Article 38 of its Statute, namely, in addition to the subsidiary sources therein enumerated, the rules and principles of international law—customary and conventional—and general principles of law recognized by civilized States. Chapter V of the draft, which affirms the principle of the binding force of the award, provides at the same time the necessary judicial safeguards of the legal character of the award in the matter of the form and the publicity of the award as well as of its interpretation. While, once more in accordance with arbitral practice, the award is considered as final without possibility of appeal, provision is made, in chapters VI and VII of the draft, for exceptional remedies calculated to uphold the judicial character of the award as well as the will of the parties as a source of the jurisdiction of the tribunal. This the draft attempts to achieve in the articles bearing on the procedure of revision and annulment in cases in which the award fails to measure up to certain fundamental procedural safeguards and, above all, in cases in which the arbitral tribunal has exceeded the powers conferred upon it by the parties. Respect for the will of the parties, in the matter of the competence conferred upon the tribunal to settle the dispute, is an essential requirement of arbitration. Excess of such powers, when duly declared by an impartial authority to have taken place, is a cause of nullity. These essential features of traditional international arbitration—and, in fact, of arbitration in general—have been meticulously followed in the draft. They constitute its main feature. To that extent the present draft on arbitral procedure must be considered as being primarily in the nature of codification of existing international law.

## B

### *Development of the law of arbitral procedure*

18. While with regard to what must be considered as the primary aspect of international arbitration the present draft codifies existing law, it proceeds, in a distinct sense, by way of developing international law

with regard to certain procedural safeguards for securing the effectiveness, in accordance with the original common intention of the parties, of the undertaking to arbitrate. Without expressly departing from any established rule, the Commission has gone in this respect outside the existing law by devising, for the acceptance of governments, such machinery as is calculated to safeguard the effectiveness of the obligation, freely undertaken, to submit to arbitration an existing dispute or future disputes.

19. As past experience has shown, the obligation to settle a dispute or future disputes by arbitration may be frustrated in a number of contingencies—all of which the Commission has attempted to cover in the present draft.

20. In the first instance, when an undertaking to arbitrate is invoked by a party, the other party may maintain that the subject matter of the dispute is not covered by the obligation to arbitrate. By claiming the right to decide unilaterally on the correctness of its view, that party may render illusory its legal obligation to submit the dispute to arbitration. Article 2 of the draft makes that result legally impossible by providing for a binding decision of the International Court of Justice on the disputed question of the arbitrability of the dispute. It must be noted that the only innovation which the draft has introduced in this connexion is that machinery has been established where it does not already exist. The legal power of the arbitral tribunal to decide on the question of the arbitrability of the dispute—i.e., the question whether the dispute comes within the scope of the obligation to arbitrate—is a well-established principle of international and national jurisprudence. However, it is essential to provide for the determination of this question in cases where there is not as yet in existence a tribunal constituted by the parties.

21. Secondly, the parties—while not disagreeing on the arbitrability of the dispute—may have failed to make provision for the effective constitution of the arbitral tribunal. It is also possible, and practice has shown that this is no mere theoretical possibility, that notwithstanding the presence of the requisite provisions for the constitution of the tribunal, a party may refuse to co-operate in the constitution of the tribunal. Article 3 of the draft is intended to meet these contingencies by conferring upon the President of the International Court of Justice the power to make the necessary appointments.

22. Thirdly, there may be a failure of the arbitral proceedings—and the ensuing frustration of the common intention of the parties to arbitrate—in consequence of the withdrawal of an arbitrator of his own accord or at the instance of the government responsible for his appointment. Articles 5 to 8 of the draft are designed to avoid that result by laying down the principle of the immutability of the tribunal, once it has been constituted, except in specified cases, and by creating the requisite machinery for the filling of vacancies regardless of whether they arise in contingencies authorized in the draft or whether they are due to action taken in violation of its provisions.

23. Fourthly, while the draft recognizes the necessity for a *compromis*, or any similar instrument adequate for the purpose, adopted by agreement of the parties either as part of the original undertaking or subsequent thereto, it does not permit the principal undertaking to be stultified as the result of the failure of the parties to agree on the *compromis*. For this reason, article 10 of

the draft includes detailed provisions for the drawing up of the *compromis* by the arbitral tribunal in cases in which the parties have failed to reach agreement on the subject. Similarly, with the same object in view, article 13 confers upon the tribunal the power to formulate its rules of procedure whenever the *compromis*, or its equivalent, fails to cover the matter wholly or in part.

24. Fifthly, in order to secure the effectiveness of the principal obligation to submit the dispute to a final and complete settlement by arbitration, the draft contains provisions for the obligatory jurisdiction of the arbitral tribunal with regard to counter-claims arising directly out of the subject matter of the dispute (article 16), for the power of the tribunal to decree provisional measures to be taken for the protection of the respective interests of the parties (article 17), for the right of the tribunal to extend, at the request of either party, the time limit for the rendering of the award as originally fixed by the parties (article 23), and for its power, subject to proper safeguards, to render an award in cases in which one of the parties has failed to appear before the tribunal (article 20).

25. Finally, the draft includes articles intended to secure the effectiveness of the undertaking to arbitrate in connexion with the revision and the annulment of the award as provided in chapter VI and VII of the draft. While the award is, in principle, final and not subject to appeal, the Commission felt it essential to recognize the legal right of the parties to ask for the revision of the award in case of discovery of new material facts, as defined in article 29, or for its annulment on important grounds enumerated in article 30. These include, in particular, excess of jurisdiction on the part of the arbitral tribunal. However, as past experience has shown, these essential remedies—unless accompanied by machinery ensuring the impartial ascertainment of the existence of the reasons invoked for the revision or the declaration of the nullity of the award—may render ineffective the legal obligation of a final settlement of a dispute through arbitration. The purpose of articles 29 and 31 is to provide such machinery.

26. The considerations referred to in the preceding paragraph apply in particular to the question of nullity on account of excess of jurisdiction. It is a fundamental—and inescapable—principle of jurisprudence that an arbitral tribunal must have the power to determine its competence on the basis of the instrument which is the source of its jurisdiction. It is a no less fundamental principle that an award rendered in excess of the powers conferred by that instrument is null and void. The satisfactory operation of these two equally essential principles can be assured only by an impartial judicial authority competent to decide whether there has taken place excess of jurisdiction. Article 31 of the draft is intended to resolve that difficulty which in the past has frequently proved detrimental to the cause of international arbitration and to the authority of international law.

27. In the view of the Commission, while the provisions of the draft referred to above constitute procedural innovations and while to that extent they fall within the orbit of development of international law inasmuch as their object is to safeguard the effectiveness of undertakings voluntarily undertaken, they are not otherwise innovations at all. In that respect their sole purpose is to safeguard the principle of good faith and the equally fundamental principle of respect for treaty obligations. Both these principles are at the very basis of international law.

28. Certain members of the Commission were of the opinion that the draft prepared by the Commission went far beyond the scope of arbitral procedure and contained substantive provisions contrary to the notion of arbitration as conceived in existing international law. They argued in particular that the draft tended to impose on contracting States an obligation to arbitrate even when the parties were unable to agree on the *compromis* so that no definite undertaking to arbitrate had been entered into; that the draft purported in many instances to make the arbitration effective where there was an absence of will by the parties, and that by unduly extending the powers of arbitral tribunals it tended to transform these bodies into a kind of supranational court of justice. They also pointed out that the draft, by making provision in several places for the intervention of the International Court of Justice in arbitral procedure, was making every arbitration case subject to the supervision and jurisdiction of that Court. They stressed that the general tendency of the draft, as well as all its provisions implying the abandonment of certain substantial rights of States in favour of arbitral tribunals, were incompatible with the fundamental principle of State sovereignty on which international law rested.

29. For reasons stated in the preceding paragraphs and in those which follow, the Commission was unable to accept these views. In particular, the Commission was unable to share the view that the procedural safeguards for the effectiveness of the obligation to arbitrate are derogatory to the sovereignty of the parties. The Commission has in no way departed from the principle that no State is obliged to submit a dispute to arbitration unless it has previously agreed to do so either with regard to a particular dispute or to all or certain categories of future disputes. However, once a State has undertaken that obligation, it is not inconsistent with principles of law or with the sovereignty of *both* parties that that obligation should be complied with and that it should not be frustrated on account of any defects in hitherto existing rules of arbitral procedure. For that reason, the Commission was unable to share the view that the draft departs from the traditional notion of arbitration in a manner inconsistent with the sovereignty of States inasmuch as it obliges the parties to abide by procedures adopted for the purpose of giving effect to the obligation to arbitrate. For that obligation is undertaken in the free and full exercise of sovereignty. While the free will of the parties is essential as a condition of the creation of the common obligation to arbitrate, the will of one party cannot, in the view of the Commission, be regarded as a condition of the continued validity and effectiveness of the obligation freely undertaken.

### III. THE CHANGES INTRODUCED IN THE DRAFT DURING THE FIFTH SESSION

30. The alterations which the Commission introduced in the draft in the course of its fifth session have been prompted in many cases by the observations of various governments. Apart from changes in drafting, these alterations have aimed, in some cases, at simplifying the procedure previously formulated. In other cases, further study has revealed certain gaps which the Commission has now thought it desirable to fill. It is convenient to make some comment on the changes thus introduced.

31. In article 3, which is concerned with the constitution of the arbitral tribunal, it was thought desirable to simplify the procedure previously formulated and

to shorten the resulting delays by eliminating recourse to third States for assistance in the constitution of the tribunal. On the other hand, the present draft now completes the scheme formulated in the previous draft by making provision for the determination of the composition of the tribunal—i.e., of the number of arbitrators—by the President of the International Court of Justice, or the judge acting in his place, in case the *compromis*, or its equivalent, is silent on the matter or if no agreement can be reached between the parties on the subject. Similarly, the draft now makes provision for the designation of the president of the tribunal in cases in which the arbitrators appointed by the parties have been unable to agree on his appointment or if his appointment has not materialized for some other reason.

32. The present draft clarifies the articles which bear on the permanency and immutability of the tribunal as an organ independent of any unilateral action of the parties initially responsible for its creation. While the draft gives full effect to the traditional principle that the parties must have the full opportunity of a free choice of arbitrators, that freedom does not extend to the right to change unilaterally the composition of the tribunal subsequent to the commencement of the proceedings. Accordingly, there is no longer in article 7 of the draft any reference to the withdrawal of an arbitrator by a party. For the same reason, the present draft, following the previous draft, does not permit an arbitrator to withdraw except with the permission of the tribunal. It must be assumed that in proper cases, such as illness or personal circumstances which make it difficult for the arbitrator to continue in his office, that permission will not be withheld. At the same time, the draft makes provision against the work of the tribunal being frustrated by the withdrawal of an arbitrator for reasons not approved by the tribunal. In such cases, it is laid down, the vacancy shall be filled in the manner prescribed for the cases in which the parties have been unable to agree on the appointment of arbitrators. Thus, although illicit withdrawal on the part of an arbitrator may cause some delay in the proceedings, it can no longer bring them permanently to a standstill.

33. For the latter reason it has been found unnecessary, unlike in article 7, paragraph 3, of the previous draft, to lay down that in the case of the withdrawal of an arbitrator the remaining members of the tribunal shall have the power to continue the proceedings and render an award. Such a procedure would hardly be warranted in cases in which the withdrawal takes place with the consent of the tribunal. However, even in cases in which an arbitrator has withdrawn in face of the refusal of the tribunal to allow him to do so, the Commission is of the opinion that the sanction as previously proposed was both too drastic and unnecessary. Undoubtedly, cases have occurred in the past in which the tribunal, after a national arbitrator has withdrawn, continued with its work and rendered an award. This was probably unavoidable seeing that no machinery was at that time in existence for filling the vacancy created by the illicit withdrawal of an arbitrator. Once such machinery is created—as is the case in the present draft—there is no longer any reason for an incomplete tribunal to proceed with the case.

34. The Commission gave detailed consideration to the question of the *compromis* and the consequences resulting from the inability of the parties to agree on its contents. In conformity with its previous draft, the Commission, in revising articles 9 and 10, acted on the view that, in addition to any general undertaking to ar-

bitrate, there is in principle a necessity for a *compromis* defining the dispute and some essential elements of the arbitration which is to take place, such as the method of constituting the tribunal and the number of arbitrators. This is so for the reason that, unlike in the case of a permanent organ such as the International Court of Justice which possesses its own constitution and rules of procedure, in the case of arbitration the relevant provisions must be expressly formulated. However, as in the previous draft, the Commission felt that no such special *compromis* is necessary where the general arbitration agreement already includes provisions which suffice for the purpose. In such cases—and this is an innovation introduced in the present draft—the Commission considered that a unilateral application, by either party, should be sufficient for the initiation of the proceedings before the tribunal. This is the purpose of paragraphs 1 and 2 of article 10 of the draft. The same paragraphs devise machinery for the cases in which the view of one party that there exist already sufficient elements of a workable *compromis* is challenged by the other party. That machinery gives scope for agreement to be reached by the parties on that disputed issue. In the event of failure to reach such an agreement—as in the case of a total absence of a *compromis*—the present draft, like the previous draft, provides for the eventual drawing up of the *compromis* by the arbitral tribunal. As at other stages of arbitration, the failure of the parties to reach agreement on a particular issue must not be allowed to frustrate the obligation to arbitrate. It will be noted that article 3 makes provision, in the absence of agreement of the parties, for the constitution of the tribunal. There will thus always be in existence a tribunal able to draw up the *compromis*.

35. The Commission has also considered it desirable to reduce the difficulties arising out of the necessity of a *compromis*. It did so by altering article 9 in the sense that it reduced substantially the number of obligatory elements of a *compromis*.

36. Following the suggestions contained in the observations of some governments, article 16 regarding the powers of the tribunal in the matter of counterclaims has been somewhat modified in the present draft. That article as now proposed emphasises more conspicuously than did the previous draft that counter-claims, in order to be subject to the jurisdiction of the tribunal, must be directly connected with the original dispute. While it is of importance, as stated in the previous draft, to secure “a complete settlement of the dispute”, it is no less essential to keep the jurisdiction of the tribunal within the compass of the original undertaking to arbitrate. In the long run the cause of international arbitration stands to gain if the law of arbitral procedure is framed in terms which will effectively discourage any undue extension of the competence of arbitral tribunals in a manner neglectful of the terms of the arbitration agreement.

37. While the Commission has thus consistently adhered to the principle that the will of the parties is the primary source of the authority of the arbitral tribunal, it has attached the greatest possible importance to the view that, once begun, the arbitral proceedings must be conducted, within the framework of the undertaking to arbitrate, in such a manner as to secure the efficiency and the ultimate effectiveness of the arbitration. For that reason the Commission has modified article 23 of the previous draft relating to the powers of the tribunal to extend the time limits, as fixed by the parties, within which the award must be rendered or the work of the

tribunal concluded. A time limit of this nature constitutes a frequent feature of arbitration agreements. According to article 23 of the previous draft, the tribunal had no power, except with the consent of both parties, to extend the period originally fixed by them, but, according to paragraph 2 of that article, the tribunal was free to decide to refrain from rendering an award if the parties could not agree on granting it an extension of the time limit which it considered essential to a proper discharge of its functions. The Commission, at its present session, considered that solution unsatisfactory. Article 23 now gives the tribunal the power, with the consent of either party, to extend the time limit as originally fixed.

38. The Commission gave careful consideration to the criticism of the previous draft in the matter of revision and declaration of nullity of the award. It decided, while otherwise fully adhering to the principle of the finality of the award, that the exceptional remedies—permitted within rigidly fixed limits—of revision and nullification must be maintained, subject to minor changes. Thus, in the matter of revision, which is confined to the case of discovery of new material facts, it restricted in article 29 the availability of that remedy to a period of ten years. Similarly, in article 31, it limited to six months the period within which an application for a declaration of nullity can be made on the ground of corruption. After considerable discussion it decided, having regard to the paramount requirement of finality, not to amplify—subject to one apparent exception—the grounds on which the annulment of the award may be sought. That exception consists in the express reference to the failure to state the reasons of the award. Such omission is now included within the notion of “a serious departure from a fundamental rule of procedure” which constitutes one of the grounds on which the validity of the award may be challenged.

39. On the other hand, the Commission decided not to treat the nullity of the *compromis* or, generally, of the undertaking to arbitrate as a reason of nullity of the award. The Commission considered that, however relevant that factor may be in principle, any attempt to take it into account is bound to give rise to serious difficulties and, possibly, to abuse. Thus, for instance, the question of the nullity of the *compromis* may become closely connected with the complicated problem of constitutional limitations upon the treaty-making power.

40. Reference may be made to certain provisions in the previous draft which the Commission considered by reference to some proposed changes and which for various reasons it decided to leave unaltered:

41. In paragraph 2 of article 4 the Commission decided to introduce no change with regard to the provision requiring “recognized competence in international law” on the part of the arbitrators. The Commission felt that the qualifying phrase “subject to the circumstances of the case” made full provision for cases which justified a departure from the general rule adopted in the article. The rule as previously adopted, and as now maintained, is more in the nature of a guide to the parties with a view to lending emphasis to the judicial nature of arbitration. It is not an imperative condition of the validity of the constitution of the tribunal.

42. In article 11 the Commission decided to retain the formulation of the previous draft declaring that “the tribunal, which is the judge of its own competence, possesses the widest powers to interpret the *compromis*”. Although some members of the Commis-

sion were of the opinion that the expression “widest” was superfluous inasmuch as it did not add to the substance of the article, the Commission decided that, even at the cost of some redundancy of expression, it was desirable to leave no doubt as to the application of so fundamental a principle of arbitral procedure. In the opinion of the Commission, the competence of the arbitral tribunal to decide, within the limits of the obligation to arbitrate, the scope of its jurisdiction includes also the right to supplement the *compromis* in all cases in which such action is essential for ensuring the conduct of the arbitration with a view to a final settlement of the dispute. For that reason, the Commission found it unnecessary to state expressly what is already implied in article 13, namely, that the tribunal is competent to formulate any rule of procedure not covered in the *compromis* or, generally, in the undertaking to arbitrate. Article 13 provides that, in the absence of any agreement between the parties concerning the procedure of the tribunal, the latter shall be competent to formulate its rules of procedure. It is evident that if the tribunal has the power, in the absence of agreement between the parties, to lay down the entire procedure, it is also entitled—and bound—to do so with regard to any particular question of procedure. Similarly, it was found unnecessary to state expressly that the tribunal possesses the power, in the absence of agreement between the parties, to supplement the *compromis*. If, in the absence of such agreement, the tribunal is competent to draw up the entire *compromis*, it obviously can do so with regard to any particular question which naturally forms part of the *compromis* and the regulation of which the tribunal considers necessary for the conduct of the proceedings.

43. The Commission considered in detail the suggestion that article 14 which provides that “the parties are equal in any proceedings before the tribunal” should be omitted as merely formulating the somewhat obvious principle of impartiality. Some members of the Commission felt, and the Commission eventually acted on that view, that, having regard to some occurrences in the past history of international arbitration, it was advisable to put that basic principle formally on record.

44. The Commission also examined the suggestion that article 22, which empowers the tribunal to take note of a settlement reached by the parties and to embody it in an award, should be changed in the direction of making the exercise of that power obligatory upon the tribunal. The Commission felt that no change is indicated in this respect. Although the will of the parties to the arbitration is, as a rule, decisive for the liquidation of the dispute, it was considered that cases may arise in which it would be improper to give the dignity and the force of an arbitral award to a settlement which is inconsistent with overriding principles of international law or which is the result of pressure exercised upon one party in a manner which cannot properly be countenanced by a judicial organ independent, when once constituted, of the will of the parties. Obviously, there is nothing to prevent both parties from agreeing to discontinue the proceedings.

45. The Commission considered afresh the question whether it was proper to lay down that in some cases—such as in article 3, paragraph 2, article 8, paragraph 2, article 28, paragraph 2, article 29, paragraph 4, and article 31, paragraph 1—the International Court of Justice or its President *shall* assume certain functions or take certain acts. The Commission felt that, as the International Court of Justice is the principal judicial

organ of the United Nations, it is proper, with regard to an instrument brought into existence under the aegis of the United Nations, that certain functions or powers shall be conferred upon the Court and that it was unnecessary that the Court should in each case signify the acceptance of the powers and functions thus conferred upon it. It was also noted that the simple conferment of such powers, without any further formalities, constitutes a frequent feature of instruments of pacific settlement.

46. The Commission examined the question whether, in those cases in which reference is made to the jurisdiction of the International Court of Justice and in which one or both parties are not parties to the Statute of the International Court of Justice, it is necessary to provide for some particular procedure. The Commission considered that such cases are covered by the provisions of Article 35, paragraph 2, of the Statute of the International Court of Justice, and by the resolution adopted by the Security Council on 15 October 1946 in pursuance of those provisions.

47. While it is unnecessary to draw attention to mere drafting changes, reference may be made to some minor alterations of substance, in relation to the previous draft, as illustrating the nature of the task of revision on which the Commission was engaged. Thus, in article 15, paragraph 2, the Commission eliminated that part of the relevant provision which imposed upon the parties the duty to co-operate with each other—as distinguished from co-operation with the tribunal—in the production of evidence. It was considered that such obligatory co-operation between the parties, although corresponding to the practice of private arbitration in some countries, went beyond the accepted international practice and, perhaps, the requirements of international arbitration. In paragraph 4 of article 15, which is concerned with visits to the scene to which a case relates (*descente sur les lieux*), the Commission has now adopted the rule that the party requesting such visits ought to be responsible for the cost involved. With regard to the rectification of the award, the Commission has adopted, in article 27, a more precise and detailed formulation of the powers of the tribunal.

#### IV. THE AUTONOMY OF THE PARTIES

48. In the course of its examination of the draft, both at the fifth and at the preceding sessions, the Commission was anxious to preserve what it considers to be the essential feature of international arbitration as distinguished from the more institutionalized procedure of international judicial settlement. That essential feature is the autonomy of the will of the parties both with regard to the choice of the arbitrators, the law to be applied and the procedure of the arbitral tribunal. Some aspects of the freedom of the parties, thus conceived, have been indicated in paragraph 17 above. That freedom of the parties is limited only by the following basic considerations: the first is that the procedure adopted, both prior and subsequent to the beginning of the proceedings, must not be such as to frustrate the common free will of the parties, as expressed in the original undertaking to arbitrate, to settle the dispute by arbitration. The second basic requirement is that there must be no impairment of the binding character of the award. Apart from these fundamental considerations, the procedure as formulated in the draft is, in general, of an optional character. It comes into operation only to the extent to which the parties have not adopted different

provisions not inconsistent with the basic considerations as stated.

49. That feature of the draft may be somewhat obscured—if not sufficiently explained—by the fact that in a number of articles of the draft the relevant clause is prefaced by the proviso “unless otherwise agreed by the parties” or a form of words to that effect. Thus in article 2, providing for a determination of the arbitrability of a dispute by the International Court of Justice, that procedure is made obligatory only “in the absence of agreement between the parties upon another procedure”. Article 12 specifies what shall be the law applied by the arbitral tribunal; but this is so only “in the absence of any agreement between the parties concerning the law to be applied”. Similar provisions appear in paragraph 2 of article 28 relating to the interpretation of the award, in paragraph 4 of article 29 bearing upon the revision of the award, and in article 32 referring to the settlement of the dispute subsequent to a declaration of the nullity of the award.

50. The fact that the insistence on the autonomy of the parties is clearly brought out in some articles does not mean that, subject to the two basic requirements outlined in paragraph 48 of the present report, it is excluded in other cases. On the contrary, most of the provisions of the draft do not rule out the adoption of a different procedure by the parties. Thus, to limit the examples to those drawn from chapter IV of the draft relating to the powers of the tribunal, there is nothing in article 15, which makes the tribunal the judge of the admissibility of evidence, to prevent the parties from laying down that certain evidence shall be conclusive, that in some matters—for instance, those covered by a period of prescription as defined by the parties—no contrary evidence shall be admissible, or that some forms of evidence shall not be permitted by the tribunal. With regard to article 16 relating to counter-claims, the parties are free to provide that no counter-claim shall be admissible. With regard to article 18 which, on the face of it, is concerned with oral procedure, there is nothing to prevent the parties from agreeing that the procedure before the tribunal shall be limited to the presentation of the written argument. What the parties cannot do is to adopt, with a binding effect, a procedure which may result in the frustration of the proceedings at the instance or as the result of the conduct of one party. Thus, to limit the examples to the same chapter IV, the parties cannot validly lay down, with regard to article 11, that the tribunal shall not have the power to determine its competence or to interpret the *compromis*, and that in the absence of agreement between the parties on these questions the tribunal shall be *functus officio*. Similarly, with regard to article 20 relating to the judgment by default, the parties cannot validly provide that if one of them refuses to appear before the tribunal and to defend its case, the tribunal shall terminate its proceedings and abstain from rendering an award. Provisions of that nature would be contrary to the fundamental purpose of the arbitration. If adopted by the parties, they would have to be disregarded by the tribunal. They would not have the result of nullifying the *compromis*.

51. Similarly, with regard to chapter V relating to the award, there is nothing to prevent the parties from modifying some of the provisions of the draft in a manner calculated to meet the exigencies of a particular situation. Thus, with regard to article 24, they may provide that the award, which shall remain secret for a time, shall be communicated to the parties without hav-

ing been read in open court. They may also lay down that the award shall be signed by the President only. With regard to article 25, they may exclude the right of the arbitrators to append dissenting opinions. What the parties cannot do is to adopt a procedure or solutions which may result at this late stage, in the frustration of the arbitration or its purpose. Thus, with regard to article 28, they cannot validly provide that if they do not agree on the interpretation of the award the latter shall be without effect.

52. The examples referred to above are, it is hoped, sufficient to bring into relief what is an essential feature of this draft on arbitral procedure, namely, that subject to the overriding purpose of arbitration, which purpose is to achieve a binding settlement between the parties independent of the will of any single one of them, the autonomous will of the parties is the basis of arbitration both in the matter of the existence of the obligation to arbitrate and the procedure calculated to give effect thereto. It may be asked why, if as a rule the constitution of the tribunal and its procedure are a function of the will of the parties, it was thought necessary in some cases to provide so expressly. The answer is that in some cases the solution adopted in the draft is necessarily couched in terms of regulations so detailed and explicit that, unless its apparent rigidity is modified by express reference to the possibility of an alternative solution by the parties, it may create the impression of being invariably obligatory. This was not the intention of the Commission.

#### V. ACTION RECOMMENDED WITH REGARD TO THE DRAFT

53. In the matter of the final drafts adopted by the Commission, its Statute provides, in article 16 (j), with regard to final drafts falling under the head of progressive development of international law, that "the Commission shall submit the draft so adopted with its recommendations through the Secretary-General to the General Assembly". With regard to final drafts falling within the purview of codification of international law, article 22 of the Statute provides that after having taken into consideration the comments of governments "the Commission shall prepare a final draft and explanatory report which it shall submit with its recommendations through the Secretary-General to the General Assembly". Article 23, paragraph 1, of the Statute provides as follows:

"The Commission may recommend to the General Assembly:

"(a) To take no action, the report having already been published;

"(b) To take note of or adopt the report by resolution;

"(c) To recommend the draft to Members with a view to the conclusion of a convention;

"(d) To convoke a conference to conclude a convention."

54. As pointed out above, the present final draft of the Commission falls within the category both of the progressive development and the codification of international law. It is probable that the same cumulation of functions must apply, in varying proportions, to other aspects of the work of the Commission. Thus, the position is similar with respect to the questions of the continental shelf and of statelessness covered by chapters III and IV of the report. So far as recommendations proposed by the Commission are concerned, it

seems to matter little whether a final draft falls within the category of development or that of codification. While article 23 of the Statute, as quoted above, specifies the kind of recommendations which the Commission may make to the General Assembly on any given subject, article 16 (j) refers to recommendations generally. There seems to be no reason for any differentiation between the two kinds of recommendation. Neither does it appear that any such differentiation was intended.

55. In the opinion of the Commission the final draft on arbitral procedure as adopted calls for action, on the part of the General Assembly, contemplated in paragraph (c) of article 23 of the Statute of the Commission, namely, "to recommend the draft to Members with a view to the conclusion of a convention". The Commission makes a recommendation to that effect.

56. The Commission believes, in the light of its study of the subject over a period of years, that a convention on arbitral procedure, on the basis formulated in the Commission's final draft, is highly desirable. While it is to be hoped that the activity and the jurisdiction of the International Court of Justice will substantially increase, it is clear, in the light of experience, that international arbitration will continue to constitute a widely accepted means of pacific settlement through binding decisions based on law. Moreover, if and when the work of the Court increases, settlement through arbitration—especially of such disputes which are of limited compass and which require speedy adjudication—will increasingly recommend itself to governments. This being so, it seems of importance to the cause of international pacific settlement and of the authority of international law that the law on the subject should be clarified and supplemented with the view to rendering international arbitration as workable, as effective, and as removed from the danger of frustration by unilateral action as possible. It is no less important to provide safeguards for maintaining the character of international arbitration as a procedure based on law and as independent in its progress of any influence of the governments bound by the obligation, voluntarily undertaken, to settle by arbitration an existing dispute or future disputes. At the same time it is no less important to maintain the autonomous nature of arbitration as created in the first instance by the will of the parties who, subject to the safeguards as indicated, must be given the opportunity of having the dispute decided by judges of their own choice and by a flexible procedure best suited to the requirements of a particular dispute or any particular disputes. The present final draft aims at giving effect to these purposes of international arbitration.

#### VI. TEXT OF THE DRAFT

57. The final draft on arbitral procedure, as adopted<sup>4</sup> by the Commission at its 232nd meeting, read as follows:

<sup>4</sup> Mr. Gilberto Amado voted against several articles for reasons expressed in the course of the discussion. Mr. F. I. Kozhevnikov declared that, for reasons he had frequently given in the course of the discussion, he had voted against the final draft on arbitral procedure as a whole, and also against the chapter of the report accompanying the draft, which was in the nature of a commentary, and, in his opinion, in many instances a one-sided commentary. Mr. J. Zourek declared that he had voted against the draft as a whole and against chapter two of the report, which formed a commentary on it, for reasons he had given in the course of the discussion.

CHAPTER I

*The undertaking to arbitrate*

*Article 1*

1. An undertaking to have recourse to arbitration may apply to existing disputes or to disputes arising in the future.
2. The undertaking shall result from a written instrument, whatever the form of the instrument may be.
3. The undertaking constitutes a legal obligation which must be carried out in good faith.

*Article 2*

1. If, prior to the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether an existing dispute is within the scope of the obligation to have recourse to arbitration, such preliminary question may, in the absence of agreement between the parties upon another procedure, be brought before the International Court of Justice by application of either party. The decision rendered by the Court shall be final.
2. In its decision on the question, the Court may prescribe the provisional measures to be taken for the protection of the respective interests of the parties pending the constitution of the arbitral tribunal.

CHAPTER II

*Constitution of the tribunal*

*Article 3*

1. Within three months from the date of the request made for the submission of the dispute to arbitration, or from the date of the decision of the International Court of Justice in pursuance of article 2, paragraph 1, the parties to an undertaking to arbitrate shall proceed to constitute the arbitral tribunal by appointing a sole arbitrator or several arbitrators in accordance with the *compromis* referred to in article 9 or with any other instrument embodying the undertaking to arbitrate.
2. If a party fails to make the necessary appointments under the preceding paragraph within three months, the appointment shall be made by the President of the International Court of Justice at the request of the other party. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.
3. The appointments referred to in paragraph 2 shall be made in accordance with the provisions of the *compromis* or of any other instrument embodying the undertaking to arbitrate. In the absence of such provisions the composition of the tribunal shall be determined, after consultation with the parties, by the President of the International Court of Justice or the judge acting in his place.
4. In cases where provision is made for the choice of a president of the tribunal by the other arbitrators, the tribunal shall be deemed constituted when

the president is selected. If the president has not been chosen within two months of the appointment of the other arbitrators, he shall be designated in the manner prescribed in paragraph 2.

*Article 4*

1. The parties having recourse to arbitration shall constitute a tribunal which may consist of one or more arbitrators.
2. Subject to the circumstances of the case, the arbitrators should be chosen from among persons of recognized competence in international law.

*Article 5*

1. Once the tribunal has been constituted, its composition shall remain unchanged until the award has been rendered.
2. A party may, however, replace an arbitrator appointed by it, provided that the tribunal has not yet begun its proceedings. An arbitrator may not be replaced during the proceedings before the tribunal except by agreement between the parties.
3. The proceedings are deemed to have begun when the President or sole arbitrator has made the first order concerning written or oral proceedings.

*Article 6*

Should a vacancy occur on account of death or incapacity of an arbitrator or, prior to the commencement of proceedings, the resignation of an arbitrator, the vacancy shall be filled by the method laid down for the original appointment.

*Article 7*

1. Once the proceedings before the tribunal have begun, an arbitrator may withdraw only with the consent of the tribunal. The resulting vacancy shall be filled by the method laid down for the original appointment.
2. Should the withdrawal take place without the consent of the tribunal, the resulting vacancy shall be filled, at the request of the tribunal in the manner provided for in paragraph 2 of article 3.

*Article 8*

1. A party may propose the disqualification of one of the arbitrators on account of a fact arising subsequently to the constitution of the tribunal. It may propose the disqualification of one of the arbitrators on account of a fact arising prior to the constitution of the tribunal only if it can show that the appointment was made without knowledge of that fact or as a result of fraud. In either case, the decision shall be taken by the other members of the tribunal.
2. In the case of a sole arbitrator the question of disqualification shall be decided by the International Court of Justice on the application of either party.
3. The resulting vacancies shall be filled, at the request of the tribunal in the manner provided for in paragraph 2 of article 3.

CHAPTER III

*The compromis*

*Article 9*

Unless there are prior agreements which suffice for the purpose, the parties having recourse to ar-

bitration shall conclude a *compromis* which shall specify:

- (a) The subject matter of the dispute;
- (b) The method of constituting the tribunal and the number of arbitrators;
- (c) The place where the tribunal shall meet.

In addition to any other provisions deemed desirable by the parties, the *compromis* may also specify the following:

- (1) The law to be applied by the tribunal, and the power, if any, to adjudicate *ex aequo et bono*;
- (2) The power, if any, of the tribunal to make recommendations to the parties;
- (3) The procedure to be followed by the tribunal;
- (4) The number of members constituting a quorum for the conduct of the proceedings;
- (5) The majority required for the award;
- (6) The time limit within which the award shall be rendered;
- (7) The right of members of the tribunal to attach dissenting opinions to the award;
- (8) The appointment of agents and counsel;
- (9) The languages to be employed in the proceedings before the tribunal; and
- (10) The manner in which the costs and expenses shall be divided.

#### Article 10

1. When the undertaking to arbitrate contains provisions which seem sufficient for the purpose of a *compromis* and the tribunal has been constituted, either party may submit the dispute to the tribunal by application. If the other party refuses to answer the application on the ground that the provisions above referred to are insufficient, the tribunal shall decide whether there is already sufficient agreement between the parties on the essential elements of a *compromis* as set forth in article 9 to enable it to proceed with the case. In the case of an affirmative decision the tribunal shall prescribe the necessary measures for the continuation of the proceedings. In the contrary case the tribunal shall order the parties to conclude a *compromis* within such time limit as the tribunal will consider reasonable.
2. If the parties fail to agree on a *compromis* within the time limit fixed in accordance with the preceding paragraph, the tribunal shall draw up the *compromis*.
3. If neither party claims that the provisions of the undertaking to arbitrate are sufficient for the purposes of a *compromis* and the parties fail to agree on a *compromis* within three months after the date on which one of the parties has notified the other of its readiness to conclude the *compromis*, the tribunal, at the request of the said party, shall draw up the *compromis*.

#### CHAPTER IV

#### Powers of the tribunal

##### Article 11

The tribunal, which is the judge of its own competence, possesses the widest powers to interpret the *compromis*.

##### Article 12

1. In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice.
2. The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of international law or of the *compromis*.

##### Article 13

1. All questions shall be decided by a majority of the tribunal.
2. In the absence of any agreement between the parties concerning the procedure of the tribunal, the tribunal shall be competent to formulate its rules of procedure.

##### Article 14

The parties are equal in any proceedings before the tribunal.

##### Article 15

1. The tribunal shall be the judge of the admissibility and the weight of the evidence presented to it.
2. The parties shall co-operate with the tribunal in the production of evidence and shall comply with the measures ordered by the tribunal for this purpose. The tribunal shall take note of the failure of any party to comply with its obligations under this paragraph.
3. The tribunal shall have the power at any stage of the proceedings to call for such evidence as it may deem necessary.
4. At the request of either party, the tribunal may visit the scene with which the case before it is connected, provided that the requesting party offers to pay the costs.

##### Article 16

The tribunal shall decide on any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute.

##### Article 17

The tribunal, or in case of urgency its president subject to confirmation by the tribunal, shall have the power to prescribe, at the request of one of the parties and if circumstances so require, any provisional measures to be taken for the protection of the respective interests of the parties.

##### Article 18

When, subject to the control of the tribunal, the agents and counsel have completed their presentation of the case, the proceedings shall be formally declared closed.

##### Article 19

The deliberations of the tribunal, which should be attended by all of its members, shall remain secret.

##### Article 20

1. Whenever one of the parties does not appear before the tribunal, or fails to defend its case, the other party may call upon the tribunal to decide in favour of its claim.
2. In such case, the tribunal may render an award

#### Article 21

1. Discontinuance of proceedings by the claimant party may not be accepted by the tribunal without the consent of the respondent.
2. If the case is discontinued by agreement between the parties, the tribunal shall take note of the fact.

#### Article 22

The tribunal may take note of a settlement reached by the parties. At the request of the parties, it may embody the settlement in an award.

#### CHAPTER V

##### *The award*

#### Article 23

The award shall be rendered within the period fixed by the *compromis* unless the tribunal, with the consent of either party, decides to extend the period fixed in the *compromis*.

#### Article 24

1. The award shall be drawn up in writing. It shall contain the names of the arbitrators and shall be signed by the president and the members of the tribunal who have voted for it.
2. The award shall state the reasons on which it is based.
3. The award is rendered by being read in open court, the agents of the parties being present or duly summoned to appear.
4. The award shall immediately be communicated to the parties.

#### Article 25

Subject to any contrary provision in the *compromis*, any member of the tribunal may attach to the award his separate or dissenting opinion.

#### Article 26

The award is binding upon the parties when it is rendered. It must be carried out in good faith.

#### Article 27

Within a month after the award has been rendered and communicated to the parties, the tribunal, either of its own accord or at the request of either party, shall be entitled to rectify any clerical, typographical or arithmetical error or errors of the same nature apparent on the face of the award.

#### Article 28

1. Any dispute between the parties as to the meaning and scope of the award may, at the request of either party and within one month of the rendering of the award, be submitted to the tribunal which rendered the award. A request for interpretation shall stay execution of the award pending the decision of the tribunal on the request.
2. If, for any reason, it is impossible to submit the dispute to the tribunal which rendered the award, and if the parties have not agreed otherwise within three months, the dispute may be referred

#### CHAPTER VI

##### *Revision*

#### Article 29

1. An application for the revision of the award may be made by either party on the ground of the discovery of some fact of such a nature as to have a decisive influence on the award, provided that when the award was rendered that fact was unknown to the tribunal and to the party requesting revision and that such ignorance was not due to the negligence of the party requesting revision.
2. The application for revision must be made within six months of the discovery of the new fact and in any case within ten years of the rendering of the award.
3. In the proceedings for revision the tribunal shall, in the first instance, make a finding as to the existence of the alleged new fact and rule on the admissibility of the application. If the tribunal finds the application admissible it shall then decide on the merits of the dispute.
4. The application for revision shall be made to the tribunal which rendered the award. If, for any reason, it is not possible to make the application to that tribunal, the application may, unless the parties agree otherwise, be made to the International Court of Justice, by either party.

#### CHAPTER VII

##### *Annulment of the award*

#### Article 30

The validity of an award may be challenged by either party on one or more of the following grounds:

- (a) That the tribunal has exceeded its powers;
- (b) That there was corruption on the part of a member of the tribunal;
- (c) That there has been a serious departure from a fundamental rule of procedure, including failure to state the reasons for the award.

#### Article 31

1. The International Court of Justice shall be competent, on the application of either party, to declare the nullity of the award on any of the grounds set out in the preceding article.
2. In cases covered by paragraphs (a) and (c) of article 30 the application must be made within sixty days of the rendering of the award and in the case covered by paragraph (b) within six months.
3. The application shall stay execution unless otherwise decided by the Court.

#### Article 32

If the award is declared invalid by the International Court of Justice, the dispute shall be submitted to a new tribunal to be constituted by agreement of the parties, or, failing such agreement, in the manner provided in article 3.

### Chapter III

## REGIME OF THE HIGH SEAS

### I. INTRODUCTORY

58. At its first session held in 1949, the International Law Commission elected Mr. J. P. A. François as special rapporteur to study the question of the régime of the high seas. At its second session, held in 1950, the Commission considered a report (A/CN.4/17) by Mr. François on the subject. In the report of the Commission submitted the same year to the General Assembly, at its fifth session,<sup>5</sup> the Commission surveyed the various questions falling within the scope of the general topic of the régime of the high seas such as nationality of ships, safety of life at sea, slave trade, submarine telegraph cables, resources of the high seas, right of pursuit, right of approach, contiguous zones, sedentary fisheries, and the continental shelf. On the basis of a second report of the special rapporteur (A/CN.4/42) most of these questions were reviewed at the third session in 1951 at which, in addition, the Commission adopted draft articles on the continental shelf and the following subjects relative to the high seas: resources of the sea, sedentary fisheries, and contiguous zones.<sup>6</sup>

59. At its fifth session, the Commission examined once more, in the light of comments of governments, the provisional draft articles adopted at the third session. Final drafts were prepared on the following questions: (i) continental shelf; (ii) fishery resources of the high seas; (iii) contiguous zone. For reasons explained below in paragraph 71, the question of sedentary fisheries has not been covered in a separate article or articles. It is hoped that the other questions relating to the high seas may, in the course of the next few years, receive further study with the view to being embodied in drafts to be finally submitted to the General Assembly. The result will be the codification of the law covering the entire field of the régime of the high seas as well as proposals for the further development of that part of international law.

60. In its work on the subject the Commission derived considerable assistance from a collection, in two volumes, published in 1951 and 1952 by the Division for the Development and Codification of International Law of the Legal Department of the Secretariat and entitled "Laws and Regulations on the Régime of the High Seas".

### II. THE CONTINENTAL SHELF

#### A

#### *Draft articles on the continental shelf*

61. As stated above in paragraph 58, at its third session held in 1951 the Commission adopted draft articles, with accompanying comment, on the continental shelf.<sup>7</sup>

<sup>5</sup> See *Official Records of the General Assembly, Fifth Session, Supplement No. 12*, document A/1316, Part VI, Chapter III.

<sup>6</sup> See the report of the Commission covering the work of its third session, *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, document A/1858, chapter VII and annex.

<sup>7</sup> *Ibid.*

Subsequent to the third session the special rapporteur re-examined these articles in the light of observations received from the following governments: Belgium, Brazil, Chile, Denmark, Ecuador, Egypt, France, Iceland, Israel, the Netherlands, Norway, the Philippines, Sweden, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Yugoslavia. The observations of governments are reproduced in Annex II to the present report. In March 1953, the special rapporteur submitted a further report on the subject (A/CN.4/60). The Commission examined the report in the course of its fifth session at its 195th to 206th, 210th and 215th meetings.

62. The Commission adopted, at its 234th meeting, the following draft articles on the continental shelf:<sup>8</sup>

#### *Article 1*

As used in these articles, the term "continental shelf" refers to the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres.

#### *Article 2*

The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

#### *Article 3*

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas.

#### *Article 4*

The rights of the coastal State over the continental shelf do not affect the legal status of the airspace above the superjacent waters.

#### *Article 5*

Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not prevent the establishment or maintenance of submarine cables.

#### *Article 6*

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or fish production.

2. Subject to the provisions of paragraphs 1 and 5

<sup>8</sup> Mr. Kozhevnikov declared that, in voting for the draft articles on the continental shelf, he wished to enter a reservation in respect of articles 7 and 8, to which he was opposed in principle for the reasons he had stated during the discussion. Mr. Zourek declared that although he had voted for the draft as a whole, he was opposed to articles 7 and 8, for reasons he had explained during the discussion. Mr. Hsu and Mr. Scelle declared that they had voted against the draft articles on the continental shelf for reasons explained during the discussion.

of this article, the coastal State is entitled to construct and maintain on the continental shelf installations necessary for the exploration and exploitation of its natural resources and to establish safety zones at a reasonable distance around such installations and to take in those zones measures necessary for their protection.

3. Such installations, though under the jurisdiction of the coastal State, do not possess the status of islands. They have no territorial sea of their own and their presence does not affect the delimitation of the territorial sea of the coastal State.

4. Due notice must be given of any such installations constructed, and due means of warning of the presence of such installations must be maintained.

5. Neither the installations themselves, nor the said safety zones around them may be established in narrow channels or on recognized sea lanes essential to international navigation.

#### Article 7

1. Where the same continental shelf is contiguous to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, the median line every point of which is equidistant from the base lines from which the width of the territorial sea of each country is measured.

2. Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, determined by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured.

#### Article 8

Any disputes which may arise between States concerning the interpretation or application of these articles should be submitted to arbitration at the request of any of the parties.

63. While adhering to the basic considerations which underlay the articles provisionally adopted in 1951, the Commission has now departed in various respects from its preliminary draft. It did so having regard to replies received from governments; the views enunciated on the subject by writers and learned societies; and its own study and discussion of the problems involved. The nature of these changes is indicated below in connexion with the comments on the articles as finally adopted.<sup>9</sup>

#### B

##### Comments on the draft articles

(i) *The concept of the continental shelf as used in the articles*

64. In defining, for the purpose of the articles adopted, the term "continental shelf" as referring "to the seabed and subsoil of the submarine areas contiguous to

the coast, but outside the area of the territorial sea, to a depth of two hundred metres", the Commission abandoned the criterion of exploitability adopted in 1951 in favour of that of a depth of two hundred metres as laid down in article 1 of the present draft. The relevant passage of article 1 as adopted in 1951 referred to the area "where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil". Some members of the Commission favoured the retention of the text adopted in 1951 for the reason, *inter alia*, that it is more in accordance with the purpose of the draft not to adopt a fixed limit for the continental shelf but to let the territorial extension of the exercise of the powers given the coastal State depend on the practical possibilities of exploitation. The Commission, following the considerations adduced by the special rapporteur in the light of observations of certain governments, has come to the conclusion that the text previously adopted does not satisfy the requirement of certainty and that it is calculated to give rise to disputes. On the other hand, the limit of two hundred metres—a limit which is at present sufficient for all practical needs—has been fixed because it is at that depth that the continental shelf, in the geological sense, generally comes to an end. It is there that the continental slope begins and falls steeply to a great depth. The text thus adopted is not wholly arbitrary for, as already stated, it takes into account the practical possibilities, so far as they can be foreseen at present, of exploration and exploitation. Such unavoidable element of arbitrariness as is contained in that text is mitigated by the rule formulated below in paragraph 66 which covers to a large extent the case of those States whose waters surrounding the coast reach a depth of two hundred metres at a very short distance from the coast.

65. While adopting, to that extent, the geographical test of the continental shelf as the basis of the juridical concept of the term, the Commission in no way holds that the existence of the continental shelf in its geographical configuration as generally understood, is essential for the exercise of the rights of the coastal State as defined in these articles. Thus, if, as is the case in the Persian Gulf, the submarine areas never reach the depth of two hundred metres, that fact is irrelevant for the purposes of article 1. The limit there laid down is the maximum limit. It does not rule out from the operation of the articles shallow submarine areas which are contiguous to the coast and which do not attain the depth of two hundred metres. The Commission considered the possibility of adopting a term other than "continental shelf", seeing that in this respect as well as in the cases referred to in the following paragraph, it departed from the strict geological connotation of the term. However, it was considered that, in particular, the wide acceptance of that term in the literature counselled its retention.

66. Similarly, while adhering in general to the geographical description and characteristics of the continental shelf, the Commission envisages the possibility and the desirability of reasonable modifications, in proper cases, of the text thus adopted. Thus, although the depth of two hundred metres as a limit of the continental shelf must be regarded as the general rule, it is a rule which is subject to equitable modifications in special cases in which submerged areas, of a depth less than two hundred metres, situated in considerable proximity to the coast are separated by a narrow channel deeper than two hundred metres from the part of the continental shelf adjacent to the coast. Such shallow areas

<sup>9</sup> Mr. Yepes voted against this paragraph of the report for reasons explained in the summary record of the 233rd meeting.

must, in these cases, be considered as contiguous to that part of the shelf. It would be for the State relying on this exception to the general rule to establish its claim to an equitable modification of the rule. In case of dispute, it must be a matter for arbitral determination whether a shallow submarine area falls within the rule as here formulated. Some such modification of the general rule is necessary in order to meet the objection that the mechanical reliance on the geological notion of the continental shelf may result in an inequality of treatment of some States as compared with others.

67. The expression "continental shelf" does not imply that it refers exclusively to continents in the current connotation of that term. It covers also the submarine areas contiguous to islands.

(ii) *The nature of the rights of the coastal State*

68. While article 2, as provisionally formulated in 1951, referred to the continental shelf as "subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources", the article as now formulated lays down that "the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources". The formulation thus adopted takes into account the views of those members of the Commission who attached importance to maintaining the language of the original draft and those who considered that the expression "rights of sovereignty" should be adopted. In adopting the article in its present formulation the Commission desired to avoid language lending itself to interpretations alien to an object which the Commission considers to be of decisive importance, namely safeguarding the principle of the full freedom of the superjacent sea and the airspace above it.

69. On the other hand, the text as now adopted leaves no doubt that the rights conferred upon the coastal State cover all rights necessary for and connected with the exploration and the exploitation of the natural resources of the continental shelf. These rights comprise full control and jurisdiction and the right to reserve exploitation and exploration for the coastal State or its nationals. Such rights include jurisdiction in connexion with suppression of crime.

70. The Commission decided, after considerable discussion, to retain the term "natural resources" as distinguished from the more limited term "mineral resources". In its previous draft the Commission only considered mineral resources, and certain members proposed adhering to that course. The Commission, however, came to the conclusion that the products of sedentary fisheries, in particular to the extent that they were natural resources permanently attached to the bed of the sea, should not be outside the scope of the régime adopted and that this aim could be achieved by using the term "natural resources". It is clearly understood, however, that the rights in question do not cover so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there. Nor do these rights cover objects such as wrecked ships and their cargoes (including bullion) lying on the sea-bed or covered by the sand of the subsoil.

71. Neither, in the view of the Commission, can the exclusive rights of the coastal State be exercised in a manner inconsistent with existing rights of nationals of other States with regard to sedentary fisheries. Any interference with such rights, when unavoidably neces-

sitated by the requirements of exploration and exploitation of natural resources, is subject to rules of international law ensuring respect of the rights of aliens. However, apart from the case of such existing rights, the sovereign rights of the coastal State over its continental shelf cover also sedentary fisheries. It may be added that this was the reason why the Commission did not think it necessary to retain, among the articles devoted to the resources of the sea, an article on sedentary fisheries. The Commission envisaged the possibility that shallow areas rendering possible the exploitation of sedentary fisheries may exist outside the continental shelf. However, that possibility was considered to be at present too theoretical to necessitate separate treatment.

72. The rights of the coastal State over the continental shelf are independent of occupation, actual or fictional, and of any formal assertion of those rights.

73. The Commission does not deem it necessary to elaborate the question of the nature and of the legal basis of the sovereign rights attributed to the coastal State. The considerations relevant to this matter cannot be reduced to a single factor. In particular, it is not possible to base the principle of the sovereign rights of the coastal State exclusively on recent practice, for there is no question, in the present case, of giving the authority of a legal rule to a unilateral practice resting solely upon the will of the States concerned. However, that practice itself is considered by the Commission to be supported by considerations of legal principle and convenience. In particular, once the sea-bed and the subsoil have become the object of active interest to States with the view to the exploration and exploitation of their resources, it is not practicable to treat them as *res nullius*, i.e., capable of being acquired by the first occupier. It is natural that coastal States should resist any such solution. Moreover, in most cases the effective exploitation of natural resources must depend on the existence of installations on the territory of the coastal State. Neither is it possible to disregard the phenomenon of geography, whether that phenomenon is described as propinquity, contiguity, geographical continuity, appurtenance or identity of the submarine areas in question with the non-submerged contiguous land. All these considerations of general utility provide a sufficient basis for the principle of sovereign rights of the coastal State as now formulated by the Commission. As already stated, that principle is in no way incompatible with the principle of the freedom of the sea.

74. While, for the reasons stated, as well as having regard to practical considerations, the Commission has been unable to countenance the idea of the internationalization of the submarine areas comprised in the concept of the continental shelf, it has not discarded the possibility of the creation of an international agency charged with scientific research and guidance with the view to promoting, in the general interest, the most efficient use of submarine areas. It is possible that some such body may be set up within the framework of an existing international organization.

(iii) *The sovereign rights of the coastal State and the freedom of the seas and of the airspace above them*

75. Some of the principal articles on the continental shelf as formulated by the Commission are devoted to the provision of safeguards for the freedom of the seas in relation to the sovereign rights of the coastal State over the continental shelf. Thus, articles 3 and 4 lay down that the rights of the coastal State over the con-

tinental shelf do not affect the legal status of the superjacent waters as high seas or of the airspace above the superjacent waters. These articles, which are couched in categorical terms, are self-explanatory. For the articles on the continental shelf are intended as laying down the régime of the continental shelf only as subject to and within the orbit of the paramount principle of the freedom of the seas and of the airspace above them. No modification of or exceptions from that principle are admissible unless expressly provided for in the various articles.

76. The same considerations apply to the sea-bed. Although the sea-bed is subject to the sovereign rights of the coastal State, for the purpose of the exploration and exploitation of its natural resources, the principle of the freedom of the seas and its legal status must be respected in that sphere, inasmuch as the coastal State must not prevent the establishment or maintenance of submarine cables by nationals of other States. That provision is designed to prevent either arbitrary prohibition or discrimination against foreign nationals. It is not otherwise intended to impair the right of the coastal State to take measures reasonably necessary for the exploration of the continental shelf and the exploitation of its natural resources. At a previous session the Commission considered whether this provision ought to be extended to pipelines on the continental shelf. Such pipelines might necessitate the installation of pumping stations which might interfere with the exploitation of the subsoil even more than cables. However, the question was considered too remote to require regulation for the time being.

77. While articles 3 and 4 lay down in general terms the basic rule of the unaltered legal status of the superjacent sea and the air above it, article 6 applies that basic rule to the main manifestations of the freedom of the seas, namely, the freedom of navigation and fishing. Paragraph 1 of that article lays down that the exploration of the continental shelf must not result in any unjustifiable interference with navigation, fishing or fish production. It will be noted, however, that what the article prohibits is not any kind of interference but only unjustifiable interference. The manner and the significance of that qualification were the subject of prolonged discussion in the Commission. The progressive development of international law, which takes place against the background of established rules, must often result in the modification of those rules by reference to new interests or needs. The extent of that modification must be determined by the relative importance of the needs and interests involved. To lay down, therefore, that the exploration and exploitation of the continental shelf must never result in any interference whatsoever with navigation and fishing might result in many cases in rendering somewhat nominal both the sovereign rights of exploration and exploitation and the very purpose of the articles as adopted. The case is clearly one of assessment of the relative importance of the interests involved. Interference, even if substantial, with navigation and fishing might, in some cases, be justified. On the other hand, interference even on an insignificant scale would be unjustified if unrelated to reasonably conceived requirements of exploration and exploitation of the continental shelf. While, in the first instance, the coastal State must be the judge of the reasonableness—of the justification—of the measures adopted, in case of dispute the matter must be settled on the basis of article 8 which governs the settlement of all disputes regarding the interpretation of application of the articles.

78. The same considerations apply and explain the provisions of article 6, in paragraphs 2 to 5, relating to installations necessary for the exploration and exploitation of the continental shelf as well as of safety zones around such installations and the measures necessary to protect them. They, too, are subject to the overriding prohibition of unjustified interference with freedom of fishing and navigation. Although the Commission did not consider it essential to specify the size of the safety zones, it believes that, generally speaking, a radius of five hundred metres is sufficient for the purpose. With regard to notice to be given, in accordance with paragraph 4 of article 6, of "installations constructed", the obligation in question refers primarily to installations already completed. There is in principle no duty to disclose in advance plans relating to contemplated construction of installations. However, in cases in which the actual construction of provisional installations is likely to interfere with navigation, due means of warning must be maintained in the same way as in the case of installations already completed and, as far as possible, due notice must be given.

79. With regard to the general status of installations it has been thought useful to lay down expressly, in paragraph 3 of article 6, that they do not possess the status of islands and that the coastal State is not entitled to claim for the installations any territorial waters of their own or to treat them as relevant for the delimitation of territorial waters. In particular, they cannot be taken into consideration for the purpose of determining the base-line. On the other hand, the installations are under the jurisdiction of the coastal State for the purpose of maintaining order and of the civil and criminal competence of its courts.

80. While generally the Commission, by formulating the test of unjustifiable interference, thought it advisable to eliminate any semblance of rigidity in adapting the existing principle of the freedom of the sea to what is an essentially novel situation, it thought it desirable to rule out expressly any right of interference with navigation in certain areas of the sea. These areas are defined in paragraph 5 of article 6 as narrow channels or recognized sea lanes essential to international navigation. They are understood to include straits in the ordinary sense of the word. The importance of these areas for the purpose of international navigation is such as to preclude, in conformity with the tests of equivalence and relative importance of the interests involved, the construction therein of installations or the maintenance of safety zones even if such installations or zones are necessary for the exploration or exploitation of the continental shelf.

(iv) *Delimitation of the boundaries of the continental shelf*

81. In the matter of the delimitation of the boundaries of the continental shelf the Commission was in the position to derive some guidance from proposals made by the committee of experts on the delimitation of territorial waters.<sup>10</sup> In its provisional draft, the Commission, which at that time was not in possession of requisite technical and expert information on the matter, merely proposed that the boundaries of the continental shelf contiguous to the territories of adjacent States should be settled by agreement of the parties and that, in the absence of such agreement, the boundary must be determined by arbitration *ex aequo et bono*. With regard

<sup>10</sup> See document A/CN.4/61/Add.1.

to the boundaries of the continental shelf of States whose coasts are opposite to each other, the Commission proposed the median line—subject to reference to arbitration in cases in which the configuration of the coast might give rise to difficulties in drawing the median line.

82. Having regard to the conclusions of the committee of experts referred to above, the Commission now felt in the position to formulate a general rule, based on the principle of equidistance, applicable to the boundaries of the continental shelf both of adjacent States and of States whose coasts are opposite to each other. The rule thus proposed is subject to such modifications as may be agreed upon by the parties. Moreover, while in the case of both kinds of boundaries the rule of equidistance is the general rule, it is subject to modification in cases in which another boundary line is justified by special circumstances. As in the case of the boundaries of coastal waters, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels. To that extent the rule adopted partakes of some elasticity. In view of the general arbitration clause of article 8, referred to below in paragraphs 86 *et seq.*, no special provision was considered necessary for submitting any resulting disputes to arbitration. Such arbitration, while expected to take into account the special circumstances calling for modification of the major principle of equidistance, is not contemplated as arbitration *ex aequo et bono*. That major principle must constitute the basis of the arbitration, conceived as settlement on the basis of law, subject to reasonable modifications necessitated by the special circumstances of the case.

83. Without prejudice to the element of elasticity implied in article 7, the Commission was of the opinion that, where the same continental shelf is contiguous to the territories of two adjacent States, the delimitation of the continental shelf between them should be carried out in accordance with the same principles as govern the delimitation of the territorial waters between the two States in question.

84. It should, however, be noted that certain members of the Commission considered that it would be premature to apply for the purposes of delimiting the continental shelf the principles drawn up by the committee of experts on the delimitation of territorial waters, since those principles have not yet been discussed by the Commission. In their opinion, the proper course would be to provide that the boundaries of the continental shelf contiguous to the territories of two or more States should be determined by agreement between the States concerned; and that in the absence of such agreement, the resultant dispute between them should be settled by one of the appropriate procedures for the peaceful settlement of disputes.

85. It is understood that the use of the term "territorial sea", as distinguished from "territorial waters", in article 7 is provisional and that the question of the terminology to be used in this and other cases in the drafts prepared by the Commission will be determined when the Commission adopts its final draft on the régime of territorial waters. Reference may also be made in this connexion to paragraph 108 below regarding the provisional use of the term "base line".

(v) *Arbitral settlement of disputes*

86. Unlike the preliminary draft, the final draft as now proposed contains a general arbitration clause

providing that any disputes which may arise between States concerning the interpretation or application of the articles should be submitted to arbitration at the request of any of the parties. The clause thus adopted covers, in addition to any boundary disputes connected with article 7, all disputes arising out of the exploration or the exploitation of the continental shelf.

87. In the view of the Commission, there are compelling reasons which render essential a clause of this nature. As already stated (see above, paragraph 68 *et seq.*) the articles on the continental shelf represent an attempt to reconcile the established principles of international law governing the régime of the high seas with the recognition of the rights of the coastal State over the continental shelf. Any such reconciliation, based as it must be on the continuous necessity of assessing the relative importance of the interests involved, must leave room for a measure of elasticity and discretion. Thus, it must often remain a question for subjective appreciation, with the consequent possibility of disputes, whether—in the words of paragraph 1 of article 6—the measures taken by the coastal State for the exploration and exploitation of the continental shelf constitute "unjustifiable" interference with navigation or fishing; whether, according to paragraph 2 of that article, the safety zones established by the coastal State are at a "reasonable" distance around the installations; whether, in the words of paragraph 5 of that article, a sea lane is a "recognized" sea lane and whether it is "essential to international navigation"; or whether the coastal State, in preventing the establishment of submarine cables, is, in fact, acting within the spirit of article 5 which makes such action permissible only if necessitated by "reasonable" measures for the exploration and exploitation of the continental shelf. The new régime of the continental shelf, unless kept within the confines of legality and of impartial determination of its operation, may constitute a threat to the overriding principle of the freedom of the seas and to peaceful relations between States. For these reasons, it seems essential that States which are in dispute concerning the exploration or exploitation of the continental shelf should be under a duty to submit to arbitration any disputes arising in this connexion. It is for this reason that the Commission, although it does not propose the adoption of a convention on the continental shelf, thought it essential to establish the principle of arbitration.

88. Certain members of the Commission were opposed to the insertion in the draft of a clause on compulsory arbitration on the grounds that there was no reason for imposing on States one only of the various measures laid down in current international law, and particularly in Article 33 of the Charter of the United Nations, for the pacific settlement of international disputes. They also pointed out that the insertion of such a clause would make the draft unacceptable to a great many States. Certain members raised the further objection that such a clause would give any contracting State the right to take action on any pretext against the other contracting States by a unilateral request to international tribunals, thus increasing the possibility in present circumstances of putting pressure on the weaker States and in effect curtailing their independence.

89. The provision for arbitration as laid down in article 8 does not exclude any other procedure agreed upon by the parties as a means for the formal settlement of the dispute. In particular, they may agree, in

matters of general importance, to refer the dispute to the International Court of Justice.

90. Inasmuch as the articles on the continental shelf cover generally its exploration and exploitation, arbitration referred to in article 8 must be regarded as applying to all disputes arising out of the exploration or exploitation of the continental shelf and affecting the international relations of the State concerned. This will cover, for instance, disputes arising in connexion with the existence of common deposits situated across the surface boundaries of the submarine areas, a problem which has arisen in some countries in the relations of owners of adjoining oil deposits.

### C

#### *Action recommended in respect of the draft articles on the continental shelf*

91. The Commission recommends to the General Assembly the adoption by resolution of this part of the present report and the draft articles on the continental shelf incorporated therein.

### III. FISHERIES

92. The question of fisheries, under the title of "Resources of the sea", has been under consideration by the Commission as part of the general topic of the régime of the high seas. Reference is made to the introductory paragraphs of the present chapter for a survey of the treatment of the subject by the Commission.

93. At its third session in 1951, the Commission adopted provisionally the articles on resources of the sea.<sup>11</sup> During its fifth session, the Commission reconsidered these articles in the light of observations sent by the following countries: Belgium, Brazil, Chile, Denmark, Ecuador, France, Iceland, the Netherlands, Norway, the Philippines, Sweden, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, Yugoslavia. The observations are reproduced in Annex II to the present report. The Commission discussed the revision of the articles at its 206th to 210th meetings.

94. The Commission adopted, at its 210th meeting, the following three draft articles covering the basic aspects of the international regulation of fisheries:

#### *Article 1*

A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged, may regulate and control fishing activities in such areas for the purpose of protecting fisheries against waste or extermination. If the nationals of two or more States are engaged in fishing in any area of the high seas, the States concerned shall prescribe the necessary measures by agreement. If, subsequent to the adoption of such measures, nationals of other States engage in fishing in the area and those States do not accept the measures adopted, the question shall, at the request of one of the interested parties, be referred to the international body envisaged in article 3.

#### *Article 2*

In any area situated within one hundred miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any

system of regulation, even though their nationals do not carry on fishing in the area.

#### *Article 3*

States shall be under a duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination. Such international authority shall act at the request of any interested State.

95. In adopting these articles the Commission adhered in substance to the provisional draft of the articles formulated at its third session in 1951. In their main aspect both drafts go beyond the existing law and must be regarded to a large extent as falling within the category of progressive development of international law. The existing position of international law is, in general, that regulations issued by a State for the conservation of fisheries in any area of the high seas outside its territorial waters are binding only upon the nationals of that State. Secondly, if two or more States agree upon regulations affecting a particular area, the regulations are binding only upon the nationals of the States concerned. Thirdly, in treaties concluded by States for the joint regulation of fisheries for the purpose of their protection against waste and extermination, the authority created for the purpose has been, as a rule, entrusted merely with the power to make recommendations, as distinguished from the power to issue regulations binding upon the contracting parties and their nationals.

96. It is generally recognized that the existing law on the subject, including the existing international agreements, provides no adequate protection of marine fauna against extermination. The resulting position constitutes, in the first instance, a danger to the food supply of the world. Also, in so far as it renders the coastal State or the States directly interested helpless against wasteful and predatory exploitation of fisheries by foreign nationals, it is productive of friction and constitutes an inducement to States to take unilateral action, which at present is probably illegal, of self-protection. Such inducement is particularly strong in the case of the coastal State. Once such measures of self-protection, in disregard of the law as it stands at present, have been resorted to, there is a tendency to aggravate the position by measures aiming at or resulting in the total exclusion of foreign nationals.

97. The articles as now adopted by the Commission are intended to provide the basis for a solution of the difficulties inherent in the existing situation. Article 3 imposes upon States the "duty to accept, as binding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within the framework of the United Nations, shall prescribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination". Moreover, it is provided there that "such international authority shall act at the request of any interested State", i.e. whether a coastal or any other State. Certain members of the Commission were opposed to the adoption of the text of article 3, on the ground that there was no real need for the creation of an international authority, since fisheries could be regulated, as in the past, by means of agreements between States. They contended that the proposal to give an international authority power to

<sup>11</sup> See *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, document A/1858, page 19.

issue regulations binding on the nationals of States was in conflict with the basic principles of international law.

98. The system proposed by the Commission protects, in the first instance, the interest of the coastal State which is often most directly concerned in the preservation of the marine resources in the areas of the sea contiguous to its coast. Obviously, if only the nationals of that State are engaged in fishing in these areas, it can fully achieve the desired object by legislating in respect of its nationals and enforcing the legislation thus enacted. If nationals of other States are engaged in fishing in a given area—whether coastal or otherwise—it is clear that the concurrence of those States is essential for the effective adoption and enforcement of the regulations in question. Article 1 provides therefore that in such cases “the States concerned shall prescribe the necessary measures by agreement”. Article 3 is intended to provide effectively for the contingency of the interested States being unable to reach agreement. In such cases, the regulations are to be issued, with binding effect, by the international authority envisaged in that article. Similarly, if subsequent to the adoption of measures of protection by the agreement of the interested States, nationals of other States engage in fishing in the area in question and if their States are unwilling to accept or respect the regulations thus issued, the international authority provided for in article 3 is empowered to declare the regulations to be binding upon the States in question and upon their nationals.

99. As stated, the system thus formulated by the Commission does not differ substantially from that provisionally adopted by the Commission at its third session. Thus, it was laid down, in article 2, that a permanent international body competent to conduct investigations of the world's fisheries and the methods employed in exploiting them “should also be empowered to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any particular area where the States concerned are unable to agree among themselves”. It is significant of the present state of opinion and of the widely felt need for the removal of what is considered by many to be a condition approaching anarchy that, in the replies sent by governments, no opposition was voiced against the proposal then advanced by the Commission.

100. The Commission, in adopting the articles, was influenced by the view that the prohibition of abuse of rights is supported by judicial and other authority and is germane to the situation covered by the articles. A State which arbitrarily and without good reason, in rigid reliance upon the principle of the freedom of the seas, declines to play its part in measures reasonably necessary for the preservation of valuable, or often essential, resources from waste and exploitation, abuses a right conferred upon it by international law. The prohibition of abuse of rights, in so far as it constitutes a general principle of law recognized by civilized States, provides to a considerable extent a satisfactory legal basis for the general rule as formulated in article 3. To that extent it may be held that that article is not altogether in the nature of a drastic departure from the principles of international law. In fact, the Commission deems it desirable that, pending the general acceptance of the system proposed in article 3, enlightened States should consider themselves bound, even if by way of a mere imperfect legal obligation, to act on the view that it may be contrary to the very prin-

ciple of the freedom of the seas to encourage or permit action which amounts to an abuse of a right and which is apt to destroy the natural resources whose preservation and common use have been one of the main objects of the doctrine of the freedom of the sea. This is so although the Commission is of the opinion that the articles adopted fall generally within the category of development of international law.

101. Reference may be made in this connexion to article 2, which lays down that, in any area situated within one hundred miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any system of regulation, even though their nationals do not carry on fishing in the area. This provision is considered to safeguard sufficiently the position of the coastal State. Such protection of its interests is equitable and necessary even if, for the time being, its nationals do not engage in fishing in the area. On the other hand, the right to participate, on a footing of equality, in any system of regulation agreed upon by other States does not imply a right to prevent or hinder its operation. The same applies to any system of regulation which may be decided upon by the international authority in conformity with article 3. In view of the wide powers conferred upon the latter, the Commission considered it unnecessary to entertain in detail the proposal, put forward at its third session and advanced once more at its present session, to entrust the coastal State itself with the right to issue regulations of a non-discriminatory character binding upon foreign nationals in areas contiguous to its coast.

102. With respect to the action which may appropriately be taken by the General Assembly in the matter of the part of the present report incorporating the final draft of articles on fisheries, the Commission recommends: (a) that the General Assembly should by resolution adopt that part of the report and the draft articles; and (b) that it should enter into consultation with the United Nations Food and Agriculture Organization with a view to the preparation of a draft convention incorporating the principles adopted by the Commission.

103. The Commission believes that the general importance and the recognized urgency of the subject matter of the articles in question warrant their endorsement by a formal act of approval on the part of the General Assembly. Considerable time must elapse before a convention on the lines here proposed can be adopted and widely ratified. In the meantime, it seems advisable that the General Assembly should lend its authority to the principles underlying the articles. In particular, endorsement should be given to the view that, where a number of interested States have agreed on a system of protection of fisheries, any regulations thus agreed upon should not, without good reason, be rendered nugatory by the action or inaction of a single State. The problem underlying the articles is one of general interest and the Commission believes that an authoritative statement of the legal position on the subject, both *de lege lata* and *de lege ferenda*, by the General Assembly is indicated as a basis of any future regulations which may be adopted.

104. While the articles adopted by the Commission contain the general principles for the protection of fisheries, it is clear that only a detailed convention or conventions can translate these principles into a system of working rules. It is probable that that object may be achieved on a regional basis rather than by way of a general convention. Conventions concluded in the

past for the protection of fisheries have been, as a rule, on a regional basis. The International Convention for the North West Atlantic Fisheries of 6 February 1949, which establishes an International Commission for the North Atlantic Fisheries assisted by panels for sub-areas and national advisory committees, and the proposed International Convention for the High Sea Fisheries of the North Pacific Ocean, approved in draft by the Tripartite Fisheries Conference at Tokyo on 14 December 1951, provide recent instructive examples of such regulations. Account would also have to be taken of the existence and experience of regional bodies such as the Indo-Pacific Fisheries Council, the General Fisheries Council for the Mediterranean and the Latin-American Fisheries Council. The matter is of a technical character; as such it is outside the competence of the Commission. A specialized body, such as the United Nations Food and Agriculture Organization would seem to be most suitable for the purpose. Accordingly, the Commission recommends that, concurrently with its approval of the articles on fisheries, the General Assembly should enter into consultation with FAO with a view to investigating the matter and preparing drafts of a convention or conventions on the subject in conformity with the general principles embodied in the articles.

#### IV. CONTIGUOUS ZONE

105. As part of the work on the régime of the high seas the Commission adopted, at its 210th meeting, the following single article on contiguous zone:

**On the high seas adjacent to its *territorial sea*, the coastal State may exercise the control necessary to prevent and *punish* the infringement, within its territory or *territorial sea*, of its customs, *immigration*, fiscal or sanitary regulations. Such control may not be exercised *at a distance beyond twelve miles from the base line from which the width of the territorial sea is measured*.**

106. The article thus adopted is identical, but for the words reproduced in italics, with that formulated by the Commission at its third session.<sup>12</sup> Apart from some qualifications and reservations, the principle underlying that article has encountered no opposition on the part of the governments which have since made observations on the subject (see Annex II to the present report). The Commission believes that principle to be in accordance with a widely adopted practice. International law does not forbid States to exercise a measure of protective, preventive, or punitive jurisdiction for certain purposes over a belt of water contiguous to its territorial sea. States have shown no disposition to challenge the exercise by other States of a limited jurisdiction of that nature. Certain members of the Commission were, however, opposed to the inclusion of this article, on the ground that it had no direct connexion with the régime of the high seas and, moreover, that several governments in their observations had also put forward the view that the article in question should be examined in connexion with the discussion of territorial waters.

107. There has been no general agreement as to the extent of the contiguous zone for the purposes as defined above. The Preparatory Committee of The

Hague Codification Conference of 1930 proposed that the breadth of the contiguous zone should be fixed at twelve nautical miles measured from the coast. While it is possible that in some cases that limit may be insufficient, having regard to technical developments in the speed of vessels and otherwise, the Commission believes that, on the whole, that limit approximates most closely to general practice as acquiesced in by States.

108. It must be noted that, in the article as now formulated, the contiguous zone of twelve miles is described as measured from the base line from which the width of the territorial sea is measured. In the article as proposed in 1951, the Commission referred to twelve miles as measured "from the coast". This change of formulation is not intended as an expression of view as to the nature of the base line forming the inner limit of the territorial sea. However, as in the case of the territorial sea, it is convenient to refer to the base line as being the more precise indication.

109. In adopting the limit of twelve miles for the exercise of the protective rights of States within the contiguous zone, the Commission does not intend to prejudice, in any direction, the results of its examination of the question of the territorial sea and of its limits.

110. Certain members of the Commission opposed the inclusion of the article on the contiguous zone, on the ground that it prejudged the question of the outer limit of territorial waters. They pointed out that by taking as the base line the inner limit of the territorial waters, the article tended to restrict the width of these waters—a point on which the Commission had not yet taken any decision.

111. It is understood that the term "customs regulations" as used in the article refers not only to regulations concerning import and export duties but also other regulations concerning the exportation and importation of goods. In addition, the Commission thought it necessary to amplify the formulation previously adopted by referring expressly to immigration—a term which is also intended to include emigration.

112. The rights of the coastal State within the contiguous zone do not include rights in connexion with security or fishing rights. With regard to the latter the Preparatory Committee of the Codification Conference of 1930 found that the replies of governments disclosed no sufficient measure of agreement on the subject. The Commission considers that in that respect there has been no change in the position. The question may become less urgent and more amenable to a solution if the proposals of the Commission relating to fisheries and contained in paragraphs 94 *et seq.*, of the present report are adopted by States.

113. The exercise of the rights of the coastal State, as here formulated, within the contiguous zone does not affect the legal status of the sea outside the territorial sea or of the airspace above the contiguous zone. Air traffic may necessitate the establishment of an air zone over which the coastal State may exercise control. However, this question is outside the subject of the régime of the high seas.

114. As the Commission has not yet adopted draft articles on the territorial sea, it recommends the General Assembly to take no action with regard to the article on the contiguous zone, since the present report is already published (article 23, paragraph 1(a), of the Commission's Statute).

<sup>12</sup> See *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, document A/1858, page 20.

## Chapter IV

### NATIONALITY INCLUDING STATELESSNESS

#### I. INTRODUCTORY

115. At its first session in 1949, the International Law Commission selected "nationality including statelessness" as a topic for codification without, however, including it in the list of topics to which it gave priority.<sup>13</sup>

116. During its third session in 1951, the Commission was notified of resolution 319 B III (XI) adopted by the Economic and Social Council on 11 August 1950, in which the Council requested the Commission to "... prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness". In response to this request, the Commission, at the same session, decided to initiate work on the topic of nationality including statelessness, and appointed Mr. Manley O. Hudson special rapporteur on the subject.<sup>14</sup>

117. Mr. Hudson, at the fourth session of the Commission in 1952, submitted a "Report on Nationality including Statelessness" (A/CN.4/50). The report comprised a working paper on the subject of statelessness. In the course of its discussion of the report, the Commission decided to request the special rapporteur to prepare, for consideration at the fifth session, a draft convention on the elimination of future statelessness and one or more draft conventions on the reduction of future statelessness. The Commission also gave general directions to guide the work of the special rapporteur.<sup>15</sup>

118. At the end of the fourth session, the Commission appointed Mr. Roberto Córdova special rapporteur on the topic of nationality including statelessness to replace Mr. Hudson who, for reasons of health, felt unable to continue as special rapporteur. The Commission also appointed Mr. Ivan Kerno as an expert to assist the special rapporteur; in his report, mentioned below, the special rapporteur expressed warm appreciation of the assistance given him by Mr. Kerno.

119. In accordance with the decision taken by the Commission at its fourth session the special rapporteur presented a report (A/CN.4/64) containing articles, accompanied by detailed comment, of two draft conventions: one on the elimination of future statelessness and another on the reduction of future statelessness. The Commission had also before it the report, referred to above in paragraph 117, of Mr. Manley O. Hudson presented in 1952, a memorandum prepared by Mr. Kerno on national legislation concerning grounds for deprivation of nationality (A/CN.4/66) and two re-

ports of the Secretary-General, namely, "A Study of Statelessness" (E/1112 and Add.1) and "The Problem of Statelessness" (A/CN.4/56 and Add.1).

120. The Commission decided to discuss and to consider the adoption of both drafts submitted by the special rapporteur. It discussed them at the 211th to 225th and 231st to 234th meetings. On 7 August 1953 at its 234th meeting, the Commission adopted provisional drafts of both conventions and decided to request the Secretary-General to issue them as a Commission document in accordance with article 16 (g) and article 21, paragraph 1, of the Statute of the Commission.<sup>16</sup> The Commission also decided, in accordance with article 16 (h) and article 21, paragraph 2 of the Statute, to invite governments to submit their comments on the draft conventions as formulated by it. The relevant articles of the two draft conventions provisionally adopted by the Commission are reproduced below together with the comment accompanying the preamble and the various articles. For the sake of convenience and comparison the two draft conventions are also reproduced, in parallel columns, at the end of the present chapter in paragraph 162.

121. The Commission deems it desirable, in order to clarify the situation, to indicate at this juncture in general terms the relation between the two drafts. The Commission adopted provisionally both draft conventions for consideration by governments. While some members of the Commission were of the opinion that only eventual acceptance of the draft Convention on the Elimination of Future Statelessness can fully solve the problem of statelessness in the future, others were of the view that the Draft Convention on the Reduction of Future Statelessness constitutes at present the practicable solution of the problem. However, the Commission is convinced of the imperative necessity of eliminating or at least drastically reducing future statelessness by international agreement, and it is of the opinion that one of the two draft conventions ought eventually to become part of international law. Accordingly, in submitting the two draft conventions to governments for their comment, the Commission does not consider it necessary to recommend to them to adopt as the basis of their comment exclusively the one or the other of the two conventions. In view of the urgency of the problem and having regard to its desire to study all the aspects of the question, the Commission recommends that governments should give consideration to

<sup>13</sup> See the report of the Commission covering the work of its first session, *Official Records of the General Assembly, Fourth Session, Supplement No. 10*, document A/925, paragraphs 16 and 20.

<sup>14</sup> See the report of the Commission covering the work of its third session, *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, document A/1858, paragraph 85.

<sup>15</sup> See the report of the Commission covering the work of its fourth session, *Official Records of the General Assembly, Seventh Session, Supplement No. 9*, document A/2163, paragraphs 29 and 31.

<sup>16</sup> Mr. Kozhevnikov voted against the draft conventions on the elimination and reduction of future statelessness as well as against the chapter of the report accompanying these conventions for the reasons of principle stated repeatedly during the discussion on the conventions. Mr. Zourek declared that he had voted against the two draft conventions and the commentaries on them for reasons which he had had occasion to explain during the discussion and, in particular, at the Commission's 228th meeting. Mr. Yepes voted against article 1 of the draft convention on the elimination of future statelessness for reasons stated in the summary records.

and comment on both draft conventions. In due course, and after receiving the comments of governments, the Commission will consider whether and in what form it should submit to the General Assembly one or more final draft conventions and what course of action it should recommend.

122. The Commission decided, in view of the considerations adduced below in paragraph 127, to ask the Secretary-General to transmit to the Economic and Social Council the draft conventions as embodied in the present report, as well as the supporting documentation referred to in paragraph 119.

123. In adopting the titles "Draft Convention on the Elimination of Future Statelessness" and "Draft Convention on the Reduction of Future Statelessness", the Commission desired to draw attention to the fact that the draft conventions are not intended to have retroactive effect and that they are not concerned with the problem of the elimination or reduction of existing statelessness. During the session, the special rapporteur prepared an interim report and drafts of conventions bearing on this latter subject (A/CN.4/75). The Commission asked the special rapporteur to devote further study to the matter and to prepare a report for the next session.

124. It is considered desirable, on grounds elaborated below and for the sake of convenience in presenting the comment, to draw attention to the fact that but for the last sentence of the preamble and articles 1 and 7 the two draft conventions are identical. For this reason it is convenient to comment together on the respective articles and preambles of both conventions.

## II. THE BASIS OF THE CONVENTIONS: THE PREAMBLES

125. The preambles of the two draft conventions read as follows:

### DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS

#### *Preamble*

*Whereas* the Universal Declaration of Human Rights proclaims that everyone has the right to a nationality,

*Whereas* the Economic and Social Council has recognized that the problem of stateless persons demands the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality,

*Whereas* statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man,

*Whereas* statelessness is frequently productive of friction between States,

*Whereas* statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law,

*Whereas* the practice of many States has increasingly tended to the progressive elimination of statelessness,

*Whereas* it is imperative, by international agreement, to eliminate the evils of statelessness,

*The Contracting Parties*

*Hereby agree as follows:*

### DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS

#### *Preamble*

Identical with the preamble of the draft Convention on the Elimination of Future Statelessness, except for the last consideration which is as follows:

*"Whereas it is desirable to reduce statelessness, by international agreement, so far as its total elimination is not possible".*

126. The preamble, in invoking the fact that the Universal Declaration of Human Rights proclaims that "everyone has the right to a nationality", is not intended as suggesting that legal obligations devolve upon Members of the United Nations from that source. However, as pointed out below, in formulating the present drafts, the Commission is fulfilling to a large extent the function of developing international law. It is proper that a convention of this nature should be inspired by a Declaration which was conceived as an expression of compelling moral principle and as a realizable standard of action for States in the sphere of human rights and fundamental freedoms. The Commission is of the opinion that in the matter of the right of nationality the principles of the Declaration lend themselves, perhaps with less difficulty than in other spheres, to transformation into legal rules capable of general application.

127. It is particularly for that reason that it has been thought fit to cite, in the second sentence of the preamble, that part of the resolution adopted on 2 March 1948 (resolution 116 D (VI)) by the Economic and Social Council which lays down that the problem of statelessness demands "the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality". In referring to the necessity of ensuring the effective right to a nationality, as distinguished from a moral right thereto, the Economic and Social Council envisaged the elimination of legal causes of statelessness through the adoption of binding legal obligations. It was for that reason that the Council, in its subsequent resolution of 8 August 1949 (resolution 248 B (IX)) decided to appoint an *ad hoc* Committee composed of representatives of governments and charged, *inter alia*, with considering "means of eliminating the problem of statelessness, including the desirability of requesting the International Law Commission to prepare a study and make recommendations on this subject". In a further resolution, part of which has been referred to above in paragraph 116, of 11 August 1950 (resolution 319 B III (XI)) the Council, considering "that it is necessary both to reduce the number of stateless persons and to eliminate the causes of statelessness", urged that "the International Law Commission prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness". While the elimination or reduction of statelessness is dictated by wider considerations of an imperative nature, it is proper, in the view of the Commission, that the conventions should recall the considered view of one of the principal organs of the United Nations which bears a special responsibility for questions such as those covered by the two draft conventions now formulated by the Commission.

128. The Commission does not consider it necessary to elaborate the reasons underlying the statement of the

preamble that "statelessness often results in suffering and hardship shocking to the conscience and offensive to the dignity of man". That fact is generally, if not universally, acknowledged. The Commission realizes that any exaggeration of the evils of statelessness ought to be avoided. In many countries, stateless persons enjoy a high degree of security and protection of fundamental human freedom. However, human dignity and basic human rights cannot be treated as a matter of degree and numbers. Even if the evils of statelessness were to affect only a limited number of persons, it would be the task of the international community to circumvent such evils in so far as that is possible through the acceptance of binding international obligations on the part of States to possess or enact laws which eliminate or considerably reduce statelessness in the future.

129. Similar considerations apply to the acknowledged fact that statelessness is "frequently productive of friction between States". It is sufficient to refer in this connexion to the situation created by statelessness resulting from denationalization of nationals resident abroad and the ensuing inability of the States where such persons reside to deport them to their country of origin.

130. International law as at present constituted is based on the principle that nationality is the link between the individual and international law. That situation may undergo a change in proportion as international law recognizes, as a matter of a legal obligation binding upon governments, rights of the individual independent of the law of the State. So long as that change has not been accomplished, statelessness renders impossible in many cases the operation of a substantial portion of international law. To that extent statelessness, although not prohibited by international law, is inconsistent with one of the basic principles of its existing structure. To that extent also the efforts to eliminate statelessness, while changing and developing international law in one direction, constitute also, in another direction, a consolidation of one of its existing basic principles in the sense that they aim at removing what is a clear contradiction resulting from the admissibility of statelessness. The preamble gives expression to that aspect of the problem.

131. This is also the position with regard to the reference in the preamble to the "practice of many States" which "has increasingly tended to the progressive elimination of statelessness". A study of recent legislation of many States, as well as the observations of various governments reproduced by the Secretary-General in his report "The Problem of Statelessness" (A/CN.4/56 and Add.1), show an articulate tendency to frame and to amend national legislation in such a manner as to either practically eliminate statelessness or reduce it to a substantial degree. To that extent the conventions drafted by the Commission may be regarded as an attempt to give expression to a deliberate tendency in the practice of States desirous to eliminate or reduce statelessness.

132. The preambles to the two draft conventions state either (as in the first convention) that it is imperative, by international agreement, to eliminate the evils of statelessness, or (as in the second convention) that it is desirable to reduce statelessness by international agreement, so far as its total elimination is not possible. As stated above in paragraph 121, the possibility must be envisaged that while some States may wish to go to

the full length of altering drastically their legislation in order to eliminate statelessness, others may not find it practicable or desirable to go so far. This is the reason for the difference in the phrasing of the two preambles. Both conventions recognize that the progress which they consider to be imperative or desirable must be achieved through international agreement. Such agreement would limit the freedom of action in a sphere which has been hitherto within the exclusive domestic jurisdiction of States. However, an agreement of this kind, freely concluded by States in the full exercise of their sovereign rights, would not be incompatible with their sovereignty. On the other hand, the preamble stresses the point that, although in theory an amelioration of the existing position can be brought about by concurrent national legislation, it is only through international agreement that such concurrent national legislation can be both secured and maintained.

### III. ELIMINATION AND REDUCTION OF STATELESSNESS AS THE RESULT OF BIRTH

#### (i) *Birth in the territory of the Contracting Parties*

133. Articles 1 to 4 of both draft conventions are concerned with the elimination or reduction of statelessness in connexion with birth. While articles 2 to 4 are common to both conventions, article 1 exhibits a difference which, although probably of limited importance in practice, is otherwise of deep significance for the States concerned. Article 1 of the draft Convention on the Elimination of Future Statelessness is as follows:

#### *Article 1*

1. A child who would otherwise be stateless shall acquire at birth the nationality of the Party in whose territory it is born.

Article 1 of the draft Convention on the Reduction of Future Statelessness is as follows:

#### *Article 1*

1. A child who would otherwise be stateless shall acquire at birth the nationality of the Party in whose territory it is born.

2. The national law of the Party may make preservation of such nationality dependent on the person being normally resident in its territory until the age of eighteen, and provide that to retain nationality he must comply with such other conditions as are required from all persons born in the Party's territory.

3. If, in consequence of the operation of such conditions as are envisaged in paragraph 2, a person on attaining the age of eighteen does not retain the nationality of the State of birth, he shall acquire the nationality of one of his parents. The nationality of the father shall prevail over that of the mother.

134. The effect of article 1 of the draft Convention on the Elimination of Future Statelessness is, so far as the contracting parties are concerned, to eliminate statelessness ensuing from birth. While no change in the legislation of countries whose law is based on the principle of *jus soli* is required to give effect to that article, it is clear that a change in this respect would be required in countries based on the principle of *jus sanguinis*.

135. It must be envisaged that States whose law on the subject is based on the latter principle and which attach importance to a link more substantial than what

may be viewed as the accidental fact of birth within their territory, may find it difficult to accept in its entirety the simple rule adopted in the draft Convention on the Elimination of Future Statelessness. For that reason, article 1 of the draft Convention on the Reduction of Future Statelessness provides that retention of the nationality of the State of birth shall be conditional on the person in question having his or her normal residence in the territory of the State of birth until the age of eighteen. That article, it will be noted, does not leave such persons stateless until the age of eighteen, when they would qualify for the nationality of the State concerned provided they are normally resident within its territory. On the contrary, such persons acquire immediately on birth the nationality of that State. They may lose it, and in some cases become stateless, if they abandon their normal residence in that State before they reach the age of eighteen. However, loss of nationality in such cases would only in exceptional cases result in statelessness, namely, in cases in which such persons have not acquired another nationality either by virtue of descent or in consequence of naturalization in the country in which they are normally resident. It will thus be seen that, so far as the elimination of statelessness on account of birth is concerned, the practical effect of both conventions is not dissimilar. At the same time, article 1 of the draft Convention on the Reduction of Future Statelessness fully safeguards the position of those countries which are not disposed to grant irrevocably their nationality by reference to the mere fact of birth.

136. Moreover, it is of importance to bear in mind that, in article 1 of both conventions, States whose law is based on the principle of descent in no way commit themselves to a complete abandonment of that basic principle. They retain it as a normal principle of their law not only with regard to their nationals, wherever born, but also with regard to non-nationals born in their territory. Such non-nationals acquire the nationality of the State of birth only if otherwise they become stateless, namely, if they do not acquire a nationality by virtue of descent. As most countries, including those whose law is also based on the territorial principle, recognize acquisition of nationality by descent, the operation of article 1 of both conventions would, for most practical purposes, be limited to persons born of stateless persons. The Commission deems it of importance to emphasize that aspect of the articles, inasmuch as it brings to light what the Commission believes to be a fact, namely, that in this as in many other cases the abolition or reduction of statelessness can be achieved without any substantial sacrifice of the basic principles of the law of nationality of any country.

137. Reference may be made here to the clause of the second paragraph of article 1 of the draft Convention on the Reduction of Future Statelessness, which lays down that the national law may provide, in addition to the requirement of normal residence, that to retain nationality a person must comply with such other conditions as are required from all other persons born in the territory of the State in question. The object and effect of that clause are strictly limited. Its purpose is to prevent a situation in which a person acquiring nationality by virtue of paragraph 1 of article 1 might be given a privileged position in relation to other nationals. Thus, a person covered by paragraph 2 of article 1 who, before attaining the age of eighteen, enters the military service of a foreign State, may lose

his nationality by virtue of the operation of article 7 of the draft Convention on the Reduction of Future Statelessness even if at the age of eighteen he is normally resident in the territory of the State of birth.

138. Moreover, in those exceptional cases in which there has been a failure to retain nationality on account of the operation of paragraph 2 of article 1, paragraph 3 of the same article provides that the person in question shall acquire the nationality of one of the parents—the nationality of the father prevailing over that of the mother. Thus the scope of the operation of paragraph 2 of article 1 of the draft Convention on the Reduction of Future Statelessness in so far as it may result in statelessness is kept within rigidly narrow limits. It may be said, therefore, that while article 1 of that convention safeguards the basic considerations of the law of countries not adhering to the territorial principle as a criterion of nationality, it approximates in its effects to the corresponding article of the draft Convention on the Elimination of Future Statelessness.

## (ii) *Foundlings*

139. Article 2 of both conventions provides as follows:

### *Article 2*

**For the purpose of article 1, a foundling, so long as its place of birth is unknown, shall be presumed to have been born in the territory of the Party in which it is found.**

It will be noted that the presumption set up in this article is a rebuttable one; it obtains only for so long as the place of birth of the foundling is unknown. It was observed in the course of the discussion on the subject that the subsequent discovery of the place of birth may in some cases entail statelessness, for instance, when the State within the territory of which the person in question is subsequently found actually to have been born does not recognize the principle of *jus soli* and, at the same time, that person does not acquire any nationality by descent. However, that contingency will not arise if the State in question is a party to the convention. The residuum of cases leaving room for statelessness is accordingly so small as to render otiose any further provision on the subject even in the draft Convention on the Elimination of Future Statelessness. It is clearly not essential in the draft Convention on the Reduction of Future Statelessness.

## (iii) *Birth on ships and aircraft*

140. Article 3 of both conventions provides as follows:

### *Article 3*

**For the purpose of article 1, birth on a vessel shall be deemed to have taken place within the territory of the State whose flag the vessel flies. Birth on an aircraft shall be considered to have taken place within the territory of the State where the aircraft is registered.**

After considerable discussion, the Commission decided that the preferable solution in this case was to adopt the simple test of the flag of the vessel and of the registration of the aircraft. It came to the conclusion that the relative infrequency of birth on vessels or aircraft did not warrant an attempt to distinguish between private and public vessels and aircraft; or, in case of ships, between birth in territorial waters and on the high

seas; or, in case of aircraft, between birth over territory, territorial waters and high seas. Any attempt at such distinction would necessitate, in the case of vessels, a preference for one of the various systems followed by States in this matter. Thus, while some States consider birth on board a vessel to provide the decisive test regardless of whether the vessel is, at the time of birth, on the high seas or in territorial waters of a foreign State, others follow a different rule. In the case of aircraft, an attempt to determine whether birth took place over territorial waters or on the high seas might lead to serious difficulties. This is an additional reason why the Commission considers that a simple test of flag or registration meets the case.

(iv) *Birth outside the territory of the contracting parties*

141. As a general rule, both conventions can provide against statelessness on account of birth only in respect of persons born in the territory of a contracting party. However, it may be possible for States to agree to consider as their nationals persons born abroad who would be otherwise stateless but who are born of parents one of whom is a national of a contracting party. This provision would cover, in particular, cases of persons otherwise stateless born abroad of parents who are nationals of a contracting party which does not recognize the principle of descent. Accordingly, article 4 of both conventions provides as follows:

*Article 4*

Whenever article 1 does not apply on account of a child having been born in the territory of a State which is not a Party to this convention, it shall acquire the nationality of the Party of which one of its parents is a national. The nationality of the father shall prevail over that of the mother.

This article may also provide a solution, so far as the contracting parties are concerned, for the very exceptional cases of persons, otherwise stateless, born in no-man's-land or in territories the sovereignty of which is undetermined or divided as in the case of *condominia*.

IV. ELIMINATION AND REDUCTION OF STATELESSNESS ON ACCOUNT OF CHANGE OF STATUS

142. Article 5 of both conventions provides as follows:

*Article 5*

1. If the law of a Party entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition, or adoption, such loss shall be conditional upon acquisition of another nationality.

2. The change or loss of the nationality of a spouse or of a parent shall not entail the loss of nationality by the other spouse or by the children unless they have or acquire another nationality.

143. In general, the above article follows the corresponding provisions of The Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws. However, the article as formulated aims at a complete exclusion of change of status as a potential cause of statelessness. Unlike The Hague Convention, it refers also to changes of status resulting

from termination of marriage, legitimation and recognition. Moreover, the enumeration in that article of the instances of changes of status is not intended to be exhaustive. The article is intended to cover all changes of status.

144. In the matter of changes of status in connexion with marriage, the Commission, which was in receipt of a communication on that subject from the Chairman of the Commission on the Status of Women, in no way intends to express approval or disapproval of the legislation of those countries which make the nationality of the wife dependent upon that of the husband. Nevertheless, so long as such legislation exists and is a potential cause of statelessness, the question of loss of nationality on account of marriage or termination of marriage must find a place in the conventions drafted by the Commission. The Commission has refrained from expressing any opinion on the question of the retention of their original nationality by women who marry nationals of a foreign country.

V. STATELESSNESS ARISING OUT OF VOLUNTARY ACT OR OMISSION

145. Except with regard to marriage, article 5 is concerned mainly with loss of nationality resulting from changes of status over which the persons in question have no control. Article 6 covers possible causes of statelessness ensuing from what are essentially voluntary acts or omissions. Article 6 of both conventions provides as follows:

*Article 6*

1. Renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality.

2. Persons who seek naturalization in a foreign country or who obtain an expatriation permit for that purpose shall not lose their nationality unless they acquire the nationality of that foreign country.

3. Persons shall not lose their nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register or on any other similar ground.

146. While paragraphs 1 and 2 of article 6 relating to renunciation, naturalization and expatriation permits follow, though in a manner more pronounced and admitting of no exceptions, some of the articles of The Hague Convention of 1930 referred to above, paragraph 3 finds no parallel in that convention. One or more of the causes of loss of nationality covered in that paragraph occur in the legislation of most States. They refer to nationals both natural born and naturalized. Thus, the acquisition or retention of nationality by virtue of the principle of descent on the part of persons resident abroad is often subject to the condition of registration with a consulate or some other authority. In the legislation of some countries, prolonged stay abroad, either in itself or if not accompanied by registration, is a cause of loss of nationality. This applies in particular to naturalized persons, especially with regard to stay in the country of origin. Paragraph 3 does not altogether exclude loss of nationality in such cases. It does so, as in other articles of the draft conventions (with the exception of article 8), only if such loss results in statelessness.

147. However, even if thus qualified, this particular provision entails an important departure from the legislation of many countries. Such departure is essential for the elimination of that particular cause of statelessness. On the other hand, the operation of that provision does not prevent disadvantages or sanctions other than loss of nationality for persons who stay abroad for considerable periods, especially if accompanied by refusal to perform military service in the country of which they are nationals, or who fail to register.

# VI. STATELESSNESS RESULTING FROM IMPOSITION OF PENALTY OR FROM PERSECUTION

148. Article 7 of the draft Convention on the Elimination of Future Statelessness provides as follows:

## *Article 7*

**The Parties shall not deprive their nationals of nationality by way of penalty if such deprivation renders them stateless.**

Article 7 of the draft Convention on the Reduction of Future Statelessness provides as follows:

## *Article 7*

1. The Parties shall not deprive their nationals of nationality by way of penalty, if such deprivation renders them stateless, except on the ground that they voluntarily enter or continue in the service of a foreign country in disregard of an express prohibition of their State.

2. In the case to which paragraph 1 above refers, the deprivation shall be pronounced by a judicial authority acting in accordance with due process of law.

149. Except for the provision in the latter convention relating to loss of nationality by way of penalty on the ground of voluntary entry or continuance in the service of a foreign country, article 7 of both conventions is identical. Its effect is comprehensive. With regard to the draft Convention on the Elimination of Future Statelessness, the Commission was not called upon to consider the intrinsic merits and the necessity of deprivation of nationality by way of penalty. It is sufficient, in order to bring it within the orbit of the convention, if such deprivation results in statelessness. However, with regard to the draft Convention on the Reduction of Future Statelessness, the Commission surveyed the various occasions for deprivation of nationality by way of penalty and came to the conclusion that only that referred to above—namely, that arising out of service with a foreign country—ought to be permitted by the convention. While various States provide for various other causes of loss of nationality by way of penalty, none of these causes was found to have received sufficiently wide recognition to warrant retention in a general convention of the type now proposed by the Commission. Deprivation of nationality is, as a rule, ancillary to the principal penalty for an offence committed by a person. While it is not within the province of the Commission to express an opinion on deprivation of nationality by way of penalty in general, it considers that it ought not to operate or be imposed in such a manner as to result in statelessness. This, in fact, is the legislative policy of some countries.

150. It must be noted that, apart from deprivation of nationality resulting in statelessness, the conventions

do not prevent parties from depriving persons, by way of penalty, of political and other rights usually associated with nationality. In some countries, the sum total of all or some political rights is occasionally described as rights of citizenship as distinguished from nationality. There is nothing, according to the draft conventions, to deprive the parties of the right to impose penalties of that description.

151. The Commission came to the conclusion, after considerable discussion, that there is no occasion to distinguish, for the purpose of statelessness caused by deprivation of nationality by way of penalty, between nationals who are natural born and those who are naturalized. As in other cases of loss of nationality, the Commission does not consider that it is within its province to express a view on the propriety of distinguishing between the two classes of citizens either generally or in connexion with deprivation of nationality on account of disloyalty or otherwise. In so far as such deprivation results in statelessness, it is ruled out by both draft conventions except in the case, applicable to all nationals alike, provided for in the first paragraph of article 7 of the draft Convention on the Reduction of Future Statelessness. The Commission did not find it necessary to decide whether the annulment of a naturalization on account of fraud in obtaining it amounts to a withdrawal of nationality (or naturalization) by way of penalty. There may be room for the view that in such cases the naturalization, having been obtained by fraud, is null and void *ab initio*. The correct solution of the difficulty, in the view of the Commission, is that such withdrawal or annulment of naturalization is, so far as it results in statelessness, not compatible with the draft Convention on the Elimination of Future Statelessness. It may be compatible with the draft Convention on the Reduction of Future Statelessness—although even in that case it would be in accordance with the spirit of the convention that such annulment should not take place after a considerable period has elapsed since the naturalization. This objection will not, of course, apply if the person in question has another nationality.

152. Article 8 of both conventions provides as follows:

## *Article 8*

**The Parties shall not deprive any person or group of persons of their nationality on racial, ethnical, religious, or political grounds.**

Unlike in other articles of the two conventions, the obligation undertaken by the parties does not depend on whether the persons deprived of their nationality become, as the result, stateless. The obligation is an absolute one. The Commission considered whether in a convention the sole object of which is the elimination of statelessness it is proper to introduce an obligation of this kind. It came to the conclusion that any other formulation of this article would be open to serious objection. It would lend itself to the interpretation that persecution through deprivation of nationality on racial, ethnical, religious or political grounds is admissible provided it does not result in statelessness. Even if no such interpretation could reasonably be put on the article in question, there was agreement that it would be undesirable to formulate anything in the nature of a conditional and qualified prohibition of oppression and persecution. Moreover, it is a fact that as a rule deprivation of nationality in such circumstances results in statelessness.

VII. STATELESSNESS AS THE RESULT OF CHANGES OF TERRITORY

153. Article 9 of both conventions provides as follows:

*Article 9*

1. Treaties providing for transfer of territories shall include provisions for ensuring that, subject to the exercise of the right of option, inhabitants of these territories shall not become stateless.

2. In the absence of such provisions, States to which territory is transferred, or which otherwise acquire territory, or new States formed on territory previously belonging to another State or States shall confer their nationality upon the inhabitants of such territory unless such persons retain their former nationality by option or otherwise or unless they have or acquire another nationality.

154. The first paragraph of this article lays upon the parties the obligation to endeavour, in any treaties which they may conclude in the future with respect to transfers of territory, to include provisions ensuring that the inhabitants of the territories concerned do not become stateless. In the nature of things, no more stringent obligation can be imposed upon them in cases in which the other contracting party is not a party to either convention on statelessness. However, the obligation of paragraph 1 is fully operative in cases in which both parties to the treaty transferring territory are parties to one of the two conventions on statelessness.

155. In making the provision ensuring the avoidance of statelessness subject to safeguarding the right of option, the draft conventions go outside their primary purpose, namely, the elimination or reduction of statelessness. However, the Commission is of the opinion that the right of option of nationality has acquired a degree of recognition so general that a failure to safeguard it in a convention of this type would signify a retrogressive step or, at least, that it would lend itself to misinterpretation.

VIII. INTERPRETATION AND IMPLEMENTATION OF THE CONVENTIONS

156. Article 10 of both conventions provides as follows:

*Article 10*

1. The Parties undertake to establish, within the framework of the United Nations, an agency to act on behalf of stateless persons before governments or before the tribunal referred to in paragraph 2.

2. The Parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent to decide upon complaints presented by the agency referred to in paragraph 1 on behalf of individuals claiming to have been denied nationality in violation of the provisions of the convention.

3. If, within two years of the entry into force of the convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been set up by the Parties, any of the Parties shall have the right to request the General Assembly to set up such agency or tribunal.

4. The Parties agree that any dispute between them concerning the interpretation or application

of the convention shall be submitted to the International Court of Justice or to the tribunal referred to in paragraph 2.

157. This article, which is common to both conventions, contains, in the first instance, a provision for the settlement of disputes between the contracting parties concerning the interpretation or application of the conventions. That provision is common to most international conventions of a legislative character, in particular, those concluded under the auspices of the United Nations. The fact that in this case the direct beneficiaries of the conventions are persons who, *ex hypothesi*, do not possess the nationality of the State interceding on their behalf is not, in the view of the Commission, decisive. The rule as to nationality of claims is not an absolute rule of international law.<sup>17</sup> It is particularly inapplicable to cases of statelessness. Moreover, parties to these conventions may fairly be held to possess an independent and general interest of their own in the maintenance of the principles of the conventions. As such they are entitled to invoke the jurisdiction of the International Court of Justice or the arbitral tribunal in accordance with paragraph 2 of article 10 of the two conventions.

158. The Commission came to the conclusion, after considerable discussion, that that tribunal, to be established within the framework of the United Nations, should also be accessible to individuals acting through an agency, equally to be established within the framework of the United Nations. The Commission did not consider that it was necessary for it to express an opinion on questions such as whether individuals are subjects of international law or whether they ought to have direct access to international tribunals or other international bodies. The Commission was concerned with the special case of persons who are threatened with statelessness and who, by definition, have no State to protect them and to espouse their cause.

159. On the other hand, the Commission felt that such persons could not easily find the means or possess the requisite information for instituting proceedings before an international tribunal. It is for that reason that it was considered necessary to make provision for an international agency to act on behalf of those persons. That agency would also subject complaints to preliminary examination with the view to ensuring that complaints which are obviously unfounded should not impede the expeditious functioning of the tribunal. Finally, it would be the task of the agency to act on behalf of the persons concerned before governments, prior to initiation of proceedings before the tribunal, with a view to disposing of the complaints by appropriate procedures of inquiry and of representations made to governments.

160. It was not considered necessary at this juncture to provide for the details of the organization either of the agency referred to in paragraph 1 or of the tribunal referred to in paragraph 2. That task must be left, in the first instance, to the contracting parties. It is only when they have failed to take the steps necessary for the purpose or when they have failed to come to an agreement on the subject that the setting up of the agency or the tribunal or both will become a responsibility of the General Assembly of the United Nations acting at the request of any of the parties.

<sup>17</sup> See Advisory Opinion of the International Court of Justice concerning *Reparation for Injuries Suffered in the Service of the United Nations*; I.C.J., Reports, 1949, page 181.

161. After the draft conventions have been approved by the General Assembly and accepted by States, they will become, in a general sense, United Nations conventions. The United Nations, by giving its approval to the conventions, will accept the responsibilities—including those of a financial nature—devolving upon it under the various provisions of article 10. The Commission considers that, quite apart from any obligation

implied in the approval of the conventions, it is consonant with the Purposes and Principles of the United Nations that the Organization should assist actively in the implementation of conventions of that kind. Stateless persons, or persons threatened with statelessness, have no State to protect them. It is proper that they should be protected, in conformity with international conventions, by the United Nations.

## IX. TEXTS OF THE DRAFT CONVENTIONS

162. The texts of the two draft conventions are as follows:

### DRAFT CONVENTION ON THE ELIMINATION OF FUTURE STATELESSNESS

#### *Preamble*

*Whereas* the Universal Declaration of Human Rights proclaims that “everyone has the right to a nationality”,

*Whereas* the Economic and Social Council has recognized that the problem of stateless persons demands “the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality”,

*Whereas* statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man,

*Whereas* statelessness is frequently productive of friction between States,

*Whereas* statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law,

*Whereas* the practice of many States has increasingly tended to the progressive elimination of statelessness,

*Whereas* it is imperative, by international agreement, to eliminate the evils of statelessness,

#### *The Contracting Parties*

*Hereby agree as follows:*

#### *Article 1*

A child who would otherwise be stateless shall acquire at birth the nationality of the Party in whose territory it is born.

#### *Article 2*

For the purpose of article 1, a foundling, so long as its place of birth is unknown, shall be presumed to have been born in the territory of the Party in which it is found.

### DRAFT CONVENTION ON THE REDUCTION OF FUTURE STATELESSNESS

#### *Preamble*

*Whereas* the Universal Declaration of Human Rights proclaims that “everyone has the right to a nationality”,

*Whereas* the Economic and Social Council has recognized that the problem of stateless persons demands “the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality”,

*Whereas* statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man,

*Whereas* statelessness is frequently productive of friction between States,

*Whereas* statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law,

*Whereas* the practice of many States has increasingly tended to the progressive elimination of statelessness,

*Whereas* it is desirable to reduce statelessness, by international agreement, so far as its total elimination is not possible,

#### *The Contracting Parties*

*Hereby agree as follows:*

#### *Article 1*

1. A child who would otherwise be stateless shall acquire at birth the nationality of the Party in whose territory it is born.

2. The national law of the Party may make preservation of such nationality dependent on the person being normally resident in its territory until the age of eighteen, and provide that to retain nationality he must comply with such other conditions as are required from all persons born in the Party's territory.

3. If, in consequence of the operation of such conditions as are envisaged in paragraph 2, a person on attaining the age of eighteen does not retain the nationality of the State of birth, he shall acquire the nationality of one of his parents. The nationality of the father shall prevail over that of the mother.

#### *Article 2*

For the purpose of article 1, a foundling, so long as its place of birth is unknown, shall be presumed to have been born in the territory of the Party in which it is found.

*Article 3*

For the purpose of article 1, birth on a vessel shall be deemed to have taken place within the territory of the State whose flag the vessel flies. Birth on an aircraft shall be considered to have taken place within the territory of the State where the aircraft is registered.

*Article 4*

Whenever article 1 does not apply on account of a child having been born in the territory of a State which is not a Party to this convention, it shall acquire the nationality of the Party of which one of its parents is a national. The nationality of the father shall prevail over that of the mother.

*Article 5*

1. If the law of a Party entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition, or adoption, such loss shall be conditional upon acquisition of another nationality.
2. The change or loss of the nationality of a spouse or of a parent shall not entail the loss of nationality by the other spouse or by the children unless they have or acquire another nationality.

*Article 6*

1. Renunciation shall not result in loss of nationality unless the person renouncing it has or acquires another nationality.
2. Persons who seek naturalization in a foreign country or who obtain an expatriation permit for that purpose shall not lose their nationality unless they acquire the nationality of that foreign country.
3. Persons shall not lose their nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register or on any other similar ground.

*Article 7*

The Parties shall not deprive their nationals of nationality by way of penalty if such deprivation renders them stateless.

*Article 8*

The Parties shall not deprive any person or group of persons of their nationality on racial, ethnical, religious or political grounds.

*Article 9*

1. Treaties providing for transfer of territories shall include provisions for ensuring that, subject to the exercise of the right of option, inhabitants of these territories shall not become stateless.
2. In the absence of such provisions, States to which territory is transferred, or which otherwise acquire territory, or new States formed on territory previously belonging to another State or States shall confer their nationality upon the inhabitants

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For the purpose of article 1, birth on a vessel shall be deemed to have taken place within the territory of the State whose flag the vessel flies. Birth on an aircraft shall be considered to have taken place within the territory of the State where the aircraft is registered.

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Whenever article 1 does not apply on account of a child having been born in the territory of a State which is not a Party to this convention, it shall acquire the nationality of the Party of which one of its parents is a national. The nationality of the father shall prevail over that of the mother.

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2. Persons who seek naturalization in a foreign country or who obtain an expatriation permit for that purpose shall not lose their nationality unless they acquire the nationality of that foreign country.
3. Persons shall not lose their nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register or on any other similar ground.

*Article 7*

The Parties shall not deprive their nationals of nationality by way of penalty if such deprivation renders them stateless, except on the ground that they voluntarily enter or continue in the service of a foreign country in disregard of an express prohibition of their State.

2. In the case to which paragraph 1 above refers, the deprivation shall be pronounced by a judicial authority acting in accordance with due process of law.

*Article 8*

The Parties shall not deprive any person or group of persons of their nationality on racial, ethnical, religious, or political grounds.

*Article 9*

1. Treaties providing for transfer of territories shall include provisions for ensuring that, subject to the exercise of the right of option, inhabitants of these territories shall not become stateless.
2. In the absence of such provisions, States to which territory is transferred, or which otherwise acquire territory, or new States formed on territory previously belonging to another State or States shall confer their nationality upon the inhabitants

of such territory unless such persons retain their former nationality by option or otherwise or unless they have or acquire another nationality.

*Article 10*

1. The Parties undertake to establish, within the framework of the United Nations, an agency to act on behalf of stateless persons before governments or before the tribunal referred to in paragraph 2.
2. The Parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent to decide upon complaints presented by the agency referred to in paragraph 1 on behalf of individuals claiming to have been denied nationality in violation of the provisions of the convention.
3. If, within two years of the entry into force of the convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been set up by the Parties, any of the Parties shall have the right to request the General Assembly to set up such agency or tribunal.
4. The Parties agree that any dispute between them concerning the interpretation or application of the convention shall be submitted to the International Court of Justice or to the tribunal referred to in paragraph 2.

of such territory unless such persons retain their former nationality by option or otherwise or unless they have or acquire another nationality.

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2. The Parties undertake to establish, within the framework of the United Nations, a tribunal which shall be competent to decide upon complaints presented by the agency referred to in paragraph 1 on behalf of individuals claiming to have been denied nationality in violation of the provisions of the convention.
3. If, within two years of the entry into force of the convention, the agency or the tribunal referred to in paragraphs 1 and 2 has not been set up by the Parties, any of the Parties shall have the right to request the General Assembly to set up such agency or tribunal.
4. The Parties agree that any dispute between them concerning the interpretation or application of the convention shall be submitted to the International Court of Justice or to the tribunal referred to in paragraph 2.

## Chapter V

### OTHER DECISIONS

#### I. WAYS AND MEANS OF PROVIDING FOR THE EXPRESSION OF DISSENTING OPINIONS IN THE REPORT OF THE COMMISSION COVERING THE WORK OF EACH SESSION

163. The International Law Commission discussed a proposal to recognize:

(a) That any member of the Commission may attach a statement of his dissenting opinion to any decision by the Commission on draft rules of international law, whenever the whole or part of the said decision does not express the unanimous opinion of the members of the Commission;

(b) That any dissenting member may briefly explain his views in a footnote if, in cases other than those covered by sub-paragraph (a) above, a decision has been taken on a question of principle affecting the work of the Commission.

This proposal was rejected by the Commission. During the discussion, it was proposed that members of the Commission should be entitled to record, in an annex to the final report, their dissent from all or part of a report adopted by the Commission and to append a brief statement of the reasons for their dissenting opinion, at a length agreed to by the Chairman or, in the event of disagreement between the Chairman and the member concerned, by the officers of the Commission. The proposal was not accepted, the vote being equally divided. The existing rule, adopted at the third session, provides that detailed explanations of dissenting opinions should not be inserted in the report, but merely a statement to the effect that, for the reasons given in the summary records, a member was opposed to the adoption of a particular passage of the report.

#### II. REPORTS FOR THE SIXTH SESSION OF THE COMMISSION

##### (i) *Law of treaties*

164. The Commission decided to request its special rapporteur on the law of treaties, Mr. Lauterpacht, to continue his work on the subject and to present a further report for discussion at the next session together with the report (A/CN.4/63) held over from the present session. After a brief exchange of views the Commission decided that the special rapporteur, in the final draft of his report, should take account of any observations which members of the Commission might make in the form of written statements.

##### (ii) *Régime of the high seas*

165. The special rapporteur on the régime of the high seas, Mr. François, was invited to undertake a further study of this topic and to prepare for the next session a report on subjects within this field which were not covered in his third and fifth reports (A/CN.4/51 and A/CN.4/69).

##### (iii) *Nationality including statelessness*

166. Mr. Córdova, special rapporteur on the topic of nationality including statelessness, was requested to continue the work on the problem of the elimination or reduction of present statelessness which he had begun in a preliminary report (A/CN.4/75) submitted to the present session. He was also invited to study the other aspects of the topic of nationality and to make in this respect such proposals to the Commission as he might deem appropriate.

##### (iv) *Draft Code of Offences against the Peace and Security of Mankind*

167. At its third session in 1951, the Commission completed a draft Code of Offences against the Peace and Security of Mankind and submitted it to the General Assembly in its report on the session. The question of the draft code was included in the provisional agenda of the sixth session of the General Assembly, but was, by a decision of the Assembly on 13 November 1951, postponed until the seventh session.

168. As a result of this decision, the Secretary-General on 17 December 1951 addressed a circular letter to the governments of Member States, in which he drew their attention to the draft code and invited them to communicate to him their comments or observations for submission to the General Assembly. Comments were received from fourteen governments and were reproduced in documents A/2162 and A/2162/Add.1.<sup>18</sup> The Secretary-General also included the question of the draft code in the provisional agenda of the seventh session of the General Assembly. The item was, however, not included in the final agenda of the seventh session on the understanding that the matter would continue to be considered by the International Law Commission.

169. In view of these circumstances, the Commission decided to request Mr. Spiropoulos, special rapporteur on the subject, to undertake a further study of the question and to prepare a report for submission at the next session.

#### III. REQUEST OF THE GENERAL ASSEMBLY CONCERNING THE CODIFICATION OF THE TOPIC "DIPLOMATIC INTERCOURSE AND IMMUNITIES"

170. By its resolution 685 (VII) of 5 December 1952, the General Assembly requested the Commission "as soon as it considers it possible, to undertake the codification of the topic 'Diplomatic intercourse and immunities', and to treat it as a priority topic". In view of the fact that the periodical election of the Commission is due to take place at the eighth session of the General Assembly, the Commission decided to postpone a decision on this matter until its next session.

<sup>18</sup> See *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 54.

IV. REPRESENTATION AT THE GENERAL ASSEMBLY

171. The Commission decided that it should be represented at the eighth session of the General Assembly, by its Chairman, Mr. J. P. A. François, for purposes of consultation.

V. TERM OF OFFICE OF MEMBERS AND RAPORTEURS

172. The Commission decided that, in accordance with the practice in United Nations organs, the present term of office of its members should expire on 31 December 1953. A special rapporteur who had not been re-elected as a member of the Commission by the General Assembly would have to cease work on that date. However, a special rapporteur who had been re-elected should continue his work unless and until the Commission as newly constituted decides otherwise.

VI. DATE AND PLACE OF THE SIXTH SESSION OF THE COMMISSION

173. The Commission decided, after consulting the Secretary-General in accordance with the terms of article 12 of its Statute and receiving the views of the latter, to hold its next session in Geneva, Switzerland, for a period of ten weeks beginning on 17 May 1954. The Commission is unanimously in favour of Geneva as a meeting-place in preference to New York, as general conditions in Geneva are more conducive to efficiency in the kind of work the members of the Commission have to perform. In particular, the library facilities in the European Office with material gathered and organized since the days of the League of Nations, have proved to be unsurpassed in the field of international law.

174. The Commission is aware that General Assembly resolution 694(VII) adopted on 20 December 1952, provides that the International Law Commission would meet in Geneva only when its session could be held there without overlapping with the summer session of the Economic and Social Council. Such overlapping as

there might be if the Commission met in Geneva beginning on 17 May 1954 is, in the opinion of the Commission, hardly avoidable under present circumstances. There are grave objections to holding the session of the Commission after the session of the Economic and Social Council. The session would then overlap with the session of the General Assembly with the result that the report of the Commission could not be considered by the General Assembly until its following session, that the Secretariat would have difficulties in assigning adequate staff to serve the Commission, and that certain members who are also members of delegations to the General Assembly might not be able to attend the session of the Commission.

175. On the other hand, a ten weeks' session to be held in its entirety before the summer session of the Economic and Social Council would also be open to objection. It would have to begin towards the end of April 1954, and those members of the Commission who are university professors would not be able to attend meetings before 1 June at the earliest. The Commission would therefore be deprived of their co-operation for more than a month. Under these circumstances, the opening date of 17 May was accepted in order to reduce to the minimum both the overlapping with the Council session and the period during which the Commission would have to be without the presence of some of its members.

176. As regards the length of the session, a period of ten weeks is considered as a minimum. Because of lack of time the Commission has been forced to postpone the consideration of two important subjects, namely, the law of treaties and the régime of the territorial sea. Essential aspects of the subject of nationality and of the régime of the high seas still remain to be studied. In the course of its next session the Commission will also have to re-examine the draft Code of Offences against the Peace and Security of Mankind. It is therefore imperative for the fulfilment of the task entrusted to the Commission that it shall be able to devote sufficient time to its work.

## ANNEX I

### Comments by governments on the draft of arbitral procedure prepared by the International Law Commission at its fourth session in 1952<sup>19</sup>

#### 1. ARGENTINA

*Letter from the permanent delegation of  
Argentina to the United Nations*

[Original: Spanish]  
[13 November 1952]

Without prejudice to any comments which the Argentine Government may wish to make when it has studied the articles of the draft in detail, I wish to point out that, in conformity with the principles upheld by my country at various international conferences, it considers that arbitral procedure should be established only for controversies which may arise in the future and which do not originate from or bear any relation to causes, situations or circumstances existing prior to the signature of a treaty on the subject.

Similarly, with regard to article 2, my Government considers that it should establish in unequivocal terms the right of States to settle for themselves questions which are within their own domestic jurisdiction.

Having made these two observations, which it considers fundamental, my Government will study with the greatest care the draft prepared by the International Law Commission, for it has always accorded its fullest support to arbitration as an institution of International law.

#### 2. BELGIUM

*Letter from the permanent delegation of  
Belgium to the United Nations*

[Original: French]  
[13 March 1953]

In the Belgian Government's opinion the Commission appears to have gone outside its task of drawing up rules on arbitral procedure, since the proposed draft deals indiscriminately with concepts of arbitration and of international justice.

The last paragraph of the introduction states that two currents of opinion were represented in the Commission. "The first followed the conception of arbitration according to which the agreement of the parties is the essential condition not only of the original obligation to have recourse to arbitration, but also of the continuation and the effectiveness of arbitration proceedings at every stage. The second conception, which prevailed in the draft as adopted and which may be described as judicial arbitration, was based on the necessity of provision being made for safeguarding the efficacy of the obligation to arbitrate in all cases in which, after the conclusion of the arbitration agreement, the attitude of the parties threatens to render nugatory the original undertaking".

<sup>19</sup> See *Official Records of the General Assembly, Seventh Session, Supplement No. 9*, document A/2163.

This second conception seems hardly acceptable if it is hoped to secure the support of the majority of States for the draft on arbitral procedure.

The Commission's proposals do not seem acceptable in their present form and certainly do not correspond to the traditional conception of arbitration according to which the parties to a dispute have the right to decide on the arbitrability of the dispute, select the arbitrators and set the limits of the *compromis*.

On the contrary, the mere undertaking to comply with the new procedure would deprive States even of the right of deciding whether the dispute should be submitted to arbitration, since the International Court of Justice would pass final judgment on the question on the mere application of one of the parties.

It may be presumed that the parties will submit to the decisions of the Court or of the arbitral tribunal, as the case may be, once they have decided, of their own free will, that the dispute is arbitrable and have chosen the arbitrators.

We believe that the draft should be changed along these lines.

#### 3. BRAZIL

*Comments of the Government of Brazil transmitted by  
a note verbale dated 24 March 1953 from the permanent  
delegation of Brazil to the United Nations*

[Original: Portuguese]

##### I

The Brazilian Government would prefer less emphasis in the draft on the legal character of arbitration.

Arbitration procedure need not be confined to settlements based on law. While in most cases arbitration is used to settle legal disputes, there is nothing to prevent its use, as numerous international instruments attest, to settle non-legal disputes where the arbitrators are empowered to base their decisions not only on law but also on equity or on special principles selected by the parties.

This being the case, certain articles of the draft might leave the parties greater latitude. For example, article 12 of the draft could be rendered more flexible by saying in general terms the arbitral tribunal should be guided by international law save where the parties have expressly agreed otherwise. Paragraph 2 of article 12 should be deleted since it lays down a rule that should be determined in special agreements, at the discretion of the parties.

Similarly in article 9, reference might be made to the principles and rules to be applied by the tribunal rather than to the "law to be applied by the tribunal".

To take another example, in article 22, the fact that the arbitral tribunal owes its existence to the will of the parties is apparently ignored.

II

Article 29 might fix a time limit for an application for the revision of the award. The period might be the same as that provided for the revision of judgments of the International Court of Justice (ten years, according to article 61, paragraph 5 of the Statute).

III

Failure to include a full statement of reasons, as required in article 24, might be made a ground for annulment of the award in article 30.

IV

The establishment of a time limit in article 31, paragraph 2, solely for the cases referred to in paragraphs (a) and (c) of the previous article hardly seem justified. In the interest of the public peace and in deference to the principle that legal situations should be permanently placed beyond doubt, a time limit should be adopted for any case arising under article 30, paragraph (b); but it might be a somewhat longer one since the circumstance envisaged will not always be as readily apparent as those referred to in the other two paragraphs.

4. CHILE

*Letter from the permanent delegation of  
Chile to the United Nations*

[Original: Spanish]  
[2 February 1953]

The Government of Chile is in general agreement with the text of the above-mentioned draft and believes the following observations might be of value:

Article 1 provides that "an undertaking to have recourse to arbitration may apply to existing disputes or to disputes arising in the future".

The term "disputes" includes, on the one hand, questions or matters which have been legally formulated before a competent authority and, on the other hand, simple disputes or controversies which have not been, or cannot be, given adequate legal expression or form. The Government of Chile is therefore of the opinion that the term "dispute" should be defined, or that its scope or significance should be restricted, by establishing the principle that a matter already settled does not constitute a dispute.

The Pact of Bogotá on the pacific settlement of international disputes, expressly states that the various procedures to effect such settlement, including arbitration, "may not be applied to matters already settled by arrangement between the parties, or by arbitral award, or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty". (article VI.)

Taken in conjunction with an effort to seek the solution of disputes by pacific means, the text of the Pact of Bogotá provides a sound basis for international solutions, since it ensures that international treaties and judgments will be respected.

Article 1, paragraph 3, provides that the undertaking to have recourse to arbitration "constitutes a legal obligation which must be carried out in good faith, whatever the nature of the agreement from which it results". This last phrase seems to obscure the meaning which the text was intended to convey. The explanation accompanying the text says that the undertaking to have recourse to arbitration "may not be based on a

mere verbal agreement", a statement which does not seem in keeping with the text of the article, which says that the undertaking must be carried out in good faith, whatever the nature of the agreement from which it results, thus also including mere verbal agreements.

Article 8 provides that "a party may propose the disqualification of one of the arbitrators on account of a fact arising subsequently to the constitution of the tribunal; it may propose the disqualification of one of the arbitrators on account of a fact arising prior to the constitution of the tribunal only if it can show, etc. . .". The Spanish word *sobrevenir* (English text: "arising") means "to happen after something else". The expression *sobrevenida anteriormente*, (English text: "arising prior to") therefore represents a contradiction in terms which should be corrected in order to avoid possible difficulties of interpretation.

Article 16 says: "For the purpose of securing a complete settlement of the dispute, the tribunal shall decide on any counter-claims or additional or incidental claims arising out of the subject-matter of the dispute".

The Government of Chile considers that the meaning of "additional or incidental claims arising out of the subject-matter of the dispute" should be made clear so as to avoid the extension of the dispute to points only remotely related to the main issue, by the submission of a series of subsidiary petitions.

Such a clarification might be effected, for example, by laying down that the additional claims should be related either directly or indirectly to the principal subject submitted to arbitration, or that they should be of such a nature that if they were not resolved, any solution that might be adopted on the principal question would be ineffective or inoperative.

Article 26 provides that: "As long as the time-limit set in the *compromis* has not expired, the tribunal shall be entitled to rectify mere typographical errors or mistakes in calculation in the award".

The expression "typographical errors" only covers errors which are made in the process of reproducing or printing a given text, and would not include errors of fact, wrong dates or incorrect geographical or proper names appearing in the original text of the sentence or in the manuscripts or evidence which were available at the time when the text in question was drawn up.

The article says that the tribunal shall be entitled to correct such errors "as long as the time-limit set in the *compromis* has not expired". If the decision was given a long time before the date of expiry of the *compromis*, there would be plenty of time to examine the calculations and ascertain what corrections were necessary; but if the decision was given only a few days or hours before the expiry of the time limit, and if the point at issue was a complicated one, it might be impossible to correct the mistakes in time. In such circumstances there would have to be further proceedings between the parties in order to correct the erroneous facts, dates, names or calculations.

The Government of Chile is therefore of the opinion that the parties should be given an adequate period of time within which to make the appropriate observations, and that this period might begin as from notification of the decision without regard to the date of expiry of the *compromis*. This additional period subsequent to the decision might be the same as that allowed to the parties to exercise their right under article 28 to request clarification of any doubtful points to which the decision might give rise.

Article 27 provides that: "The award is binding upon the parties when it is rendered, and it must be carried out in good faith". We consider that the text of this provision may give rise to difficulties of application, since the party which has obtained a decision in its favour may require immediate compliance, while the other party may submit to the tribunal a question of interpretation which would delay compliance until the desired clarification had been obtained. A similar situation might arise if the decision contained important errors of calculation or fact, as for example, a mistake in the date as from which interest or some other payment is due, etc.

Chile considers that the text of this provision should be brought into line with the provisions of articles 26 and 28, and that execution of the decision should not become compulsory until the questions to which those provisions relate had been settled.

## 5. INDIA

*Letter from the Ministry for Foreign Affairs of India*  
[6 March 1953]

The Government of India are in general agreement with the draft prepared by the International Law Commission but some of the provisions of these draft articles depart to such an extent from recognized international practice in regard to arbitration, and even from the principles underlying that practice that the Government of India find themselves unable to accept them in their present form without reservation.

They therefore suggest that the draft be modified as follows:

(a) Article 2 of the draft provides that if, prior to the constitution of an arbitral tribunal, the parties disagree over the existence of a dispute, or on whether an existing dispute is within the scope of the obligation to have recourse to arbitration, the question may be brought before the International Court of Justice on the application of either party without the consent of the other. The ruling principle of international arbitration is that there should be an agreement of both parties, at least in the initial stages of the procedure. Contrary to this principle, the effect of the draft article would be to confer a compulsory jurisdiction on the International Court without the consent of one party in regard to a vital question, namely, the arbitrability of an existing dispute or the existence of an alleged dispute. The article in its present form is unacceptable to India.

(b) Article 7, paragraph 3, provides that on the withdrawal of a member the award may be made by the remaining members of the tribunal. The vacancy caused by such withdrawal will presumably not come under article 6 and there is no other provision for filling the vacancy. This may not be fair to the party whose member has withdrawn, and it is desirable that even on such occasions, some provision should exist for filling the vacancy. A possible method may be to empower the International Court of Justice to fill the vacancy, if the parties do not agree to it within a fixed time.

(c) Article 8 appears to suffer from the same defect as the one just mentioned in regard to article 7, and requires to be suitably amended.

(d) Regarding the second sentence of paragraph 1 and paragraph 2 of article 8, it appears desirable that the International Court should be entrusted with making both these decisions. In international tribunals where

antagonistic interests are represented, it is not advisable that the disqualification of one member of the tribunal should be left to the decision of the other members.

(e) Article 12, paragraph 2, which prohibits a finding of a *non liquet*, is not acceptable to India in the present stage of development of international law. It is true that according to most juridical systems a judge in a municipal court may not refuse judgment on the ground of the silence or obscurity of the law, but the extension of this principle to judicial arbitration in the international field appears to be fraught with grave risks.

(f) Article 16, in the opinion of the Government of India goes too far. Even under municipal law, the courts do not admit "counter-claims" and "additional claims" without distinction. Before the International Court of Justice, a counter-claim is admitted only when it is directly connected with the subject-matter of the application and comes within the jurisdiction of the court (article 63 of the Rules of the International Court of Justice). There should be some such restriction on the powers of the tribunal in order to prevent an abuse of procedure.

(g) In article 23, paragraph 2, the significance of "may refrain" is not understood. If the parties do not agree to an extension of the period, under paragraph 1 of the article, the tribunal cannot but refrain from rendering an award. It is doubtful whether, with the permissive "may refrain", paragraph 2 serves any useful purpose at all.

(h) Under article 28, paragraph 2, a dispute about the meaning and scope of an award is made referable to the International Court of Justice at the request of one party only. It is only the tribunal which has actually given a decision, that can furnish an authentic interpretation of that decision, should a dispute arise. If the tribunal is no longer available, a new dispute has clearly arisen which must be decided in accordance with the existing State practice in regard to arbitration, and not by the imposition of the International Court at the unilateral request of one of the parties. The Government of India are therefore not able to accept this paragraph of article 28.

(i) Similar considerations apply to the second sentence of paragraph 4 in article 29.

(j) Articles 30, 31 and 32 introduce the possibility of challenging the validity of an award on certain grounds. This is contrary to the existing practice under international law according to which the award settles the dispute definitely and without appeal (cf. article 81 of the Statute of the Permanent Court of Arbitration). Any other regulation would detract very considerably from the value of the award, as it is more than likely that the defeated party will attempt to challenge the award on any grounds, whether possible or impossible. There is the risk of introducing the International Court of Justice as a regular court of revision and thereby detracting from the efficacy of the arbitral procedure. These three articles are therefore entirely unacceptable to the Government of India.

## 6. NETHERLANDS

*Letter from the permanent delegation of the Netherlands to the United Nations*

[1 April 1953]

The Netherlands Government were very interested to study the draft convention on arbitral procedure of the

International Law Commission of the United Nations. This Government welcome any possible contribution to the further development of an international legal order in which force will be eliminated as a method of settling disputes. For that very reason, the Netherlands Government believe the draft convention of the International Law Commission to be a valuable contribution. Nevertheless the draft is giving rise to the following observations.

Arbitration ranks among the oldest means of peacefully settling international disputes. In order to maintain its place beside more recent judicial means, arbitration should retain definite characteristics of its own by which to distinguish itself from judicial settlement. These special qualities should induce governments to keep arbitration in store as a helpful instrument. Amongst these characteristics the somewhat mediatory quality of the award should be first in our mind. Though arbitration must be kept on the "basis of respect for law" according to the First Convention of The Hague of 1899, the award, however, will always show a predisposition towards mediation and arbitrators are prone to adhere to the law in a less orthodox way than a judge is apt to do, as soon as they consider such deviation more in keeping with general principles of law and equity. The rule *dura lex sed lex* will be less resorted to by arbitrators than by judges.

Another highly important characteristic difference between the two institutions is to be found in the greater prerogatives of the parties allowed for in arbitration, in regard to both the composition of the tribunal as well as the course of the procedure. From this special characteristic of arbitration follows the undesired consequence that it is rather easy for an unwilling party to find an excuse for shirking its engagements. For that very reason, the barring of this way out has been under study since the First Hague Conference, 1899. The draft convention of the International Law Commission has paid much attention to the same matter with a view to setting up some watertight rules rendering impossible any future attempt at invasion by a State which once accepted binding arbitration. However praiseworthy this ambition is, yet some doubt may arise whether in this way arbitration will not be divested of one of its specific characteristics and whether this may not entail the impossibility for arbitration to maintain itself beside international judicature. In other words: may not arbitration lose its attractiveness for the States?

This objection would not be very important, if the States would show willingness to turn to acceptance of compulsory international jurisdiction instead. But we should prevent a continued disuse of arbitration or, even worse, its complete losing ground, if this would not be compensated by an extension of international compulsory jurisdiction. Otherwise, our endeavours aimed at the perfection of arbitration would eventually have an adverse result.

The Netherlands Government are not sure that the International Law Commission has completely avoided this danger. This Government doubt whether a great number of States will not feel inclined to reject the draft because in their view it might restrict too much the lenient rules of arbitral procedure.

In order to further the acceptance of the convention as much as possible and to prevent petrification of arbitration resulting from aspirations towards perfection, the International Law Commission might consider a clause providing for an opportunity to accept the con-

vention with reservations. This might be done either by allowing any reservations or by indicating which articles could be excepted from ratification. Even if extensive use would be made of the opportunity to make reservations, the new obligations resulting from the acceptance of the other articles might be regarded again.

Even if the number of ratifications would remain small, the Netherlands Government would consider the draft important because it contains various regulations promoting a well-ordered arbitration and because it will therefore induce the States to insert them in future arbitration treaties or to supplement existing treaties.

In addition to these more general observations on the character of the draft convention the Netherlands Government would like to make the following remarks as to the proposed articles.

#### Article 3

In drafting this article account should be taken of the possibility that by some preceding arbitration treaty a competent tribunal may already have been established between the parties. If in the absence of any agreement between the parties on the composition of the tribunal it must be composed in accordance with the convention, one has to take into consideration the regulations on the choice of the arbitrators given in a treaty already in existence between the parties. Especially when the parties to the dispute are both parties to The Hague Convention on the Pacific Settlement of Disputes, due account should be taken of its rules on the appointment of arbitrators.

#### Article 7

This article gives some rules which in the opinion of this Government, defeat their object. They result from emphasizing too much the case of arbitrators withdrawing under pressure of their governments. Thereby the possibility of withdrawing for respectable motives has been pushed far too much into the background. The Netherlands Government judge it inadmissible that an arbitrator, realizing that his former associations with the case impel him to withdraw, could be forced by the other members of the tribunal to stay on. No more could the Netherlands Government see why, "if any doubt arises in this connexion within the tribunal" the replacement could only be asked by unanimity. It seems undesirable that one member only could impede the withdrawal of an arbitrator, whose impartiality is doubted by a majority.

The Government think it no more right to have the procedure continuing before the other arbitrators after the withdrawal referred to in this article. The Government hold it necessary to supplement the tribunal. The Netherlands Government realize that such modifications might be abused. However, they deem unjustifiable the way suggested by article 7 of the proposed draft.

In their opinion it is moreover not clear whether a judge withdrawing after the opening of the proceedings for reasons of ill-health would have to be treated according to article 6 or to article 7, paragraph 2.

#### Article 8

The relation between articles 7 and 8 is not altogether clear. The Government understand that the parties may only invoke article 8, and not article 7, and that article 8 also applies "once the proceedings before the tribunal have begun".

In the case provided for by article 8, the Netherlands Government do not think it right to ask for a unanimous decision of the other members of the tribunal. Without

doubt the recusal of a judge is a grave matter, which ought to be decided upon with caution. On the other hand, the confidence to be placed in the absolute integrity and impartiality of arbitrators is of such paramount importance that we must exclude the possibility of a judge staying on in spite of the fact that he has lost the confidence of the majority of the tribunal. It seems unwarranted that such doubt about the presence of grounds for recusal be precluded from causing this recusal, whenever one member of the tribunal appears willing to cover the accused against the three other members who have lost their confidence in him.

#### Article 9

The Government wonder whether experience has not taught the desirability of inserting a new paragraph—perhaps after article 9 (d)—reading: “The nature and the way of administering evidence to be offered to the tribunal” (“*la nature et le mode d'administration des preuves présentées au Tribunal*”). Originally such a proposal seems to have been put forward by the Commission. This Government do not know why this proposition was eventually dropped.

In paragraph (f) “a decision” should be substituted for “an award”.

#### Article 11

The Netherlands Government feel some doubt about the necessity of giving the tribunal power to interpret the *compromis* in deviation from the interpretation on which the parties themselves agree. This power seems undesirable, and this Government propose to add to article 11 the words: “if the parties are at variance in this respect” (“*si les parties ne sont pas d'accord à ce sujet*”).

#### Article 13

The Netherlands Government are of the opinion that this rule, which according to the wording of the article refers exclusively to disagreement on procedure, should be extended to any subject that according to article 9 must be included in the *compromis*.

#### Article 14

In the opinion of the Netherlands Government this article is redundant. The Government do not deny the correctness of the principle expressed in this article, but they realize that other principles—like the absolute impartiality of the arbitrators—are as well a requisite for every tribunal without their being expressly laid down in the convention. By inserting a special article on the equality of the parties in the proceedings before the tribunal, one might cause some doubt whether other principles of arbitral procedure are considered of less significance.

Moreover, it should be noted that the requirement of equality, expressly laid down here, could by its very vagueness afford an opportunity for abuse in applying for the annulment of the award, as mentioned in the comment on article 14.

#### Article 15

The wording that the parties should “co-operate with one another . . . in the production of evidence” gives the impression that every party must collaborate in the gathering of evidence to be used against itself, which no doubt cannot have been intended.

One might consider giving the tribunal power to “visit the scene” (provided that the interested party offers to pay the costs) even if the other party is not willing to co-operate.

#### Article 16

The words “for the purpose of securing a complete settlement of the dispute” might be taken to constitute a restrictive qualification on the right of the tribunal to decide on any additional claim. This implication apparently not being meant, a different wording might be chosen.

#### Article 28

The French text “*sauf accord entre les parties*” seems preferable to the English text “unless the parties agree otherwise”, because the first indicates clearly that this agreement may have been arrived at in an earlier treaty.

#### Article 29

In paragraph 2 it should be indicated that the term of six months starts at the moment of the “discovery of the new fact” by the party applying for revision.

The wording of the third paragraph should also be altered. One cannot conceive of the proceedings for revision to be opened by a judgment of the tribunal recording the existence of an alleged new fact, because this judgment can only be contradictorily arrived at. Therefore, the proceedings leading towards this judgment are part of the “proceedings for revision”.

### 7. NORWAY

*Letter from the permanent delegation of Norway to the United Nations (received 25 February 1953)*

...  
The Norwegian Government is in agreement with the principles upon which the draft is based and . . . Norway could adhere to a convention embodying in the main the provisions contained in the draft. It is suggested, however, that the situation with regard to already existing bilateral or multilateral treaties concerning international arbitral procedure be clarified, when the draft is reconsidered by the Commission at its next session. In the opinion of the Norwegian Government it is not clear from the present draft whether the convention resulting from the draft would replace older bilateral or multilateral treaties on international arbitral procedure, as for instance The Hague Convention of 1907 regarding pacific settlement of international disputes or the General Act of 1928 (as revised in 1949), or whether it would be supplementary to such treaties as between States parties to them.

### 8. SWEDEN

*Letter from the Ministry for Foreign Affairs of Sweden*

[Original: French]  
[19 March 1953]

The text prepared by the Commission contains some parts which its authors regard as the codification of existing international law and other parts which are not of this nature but constitute suggestions for future legislation. The presence of the latter suggests that the draft is intended as the forerunner of an international convention in which its various articles would be reproduced. Without going into the details of the draft, the Swedish Government considers it suitable to serve as a basis for such an undertaking.

Nevertheless, the Swedish Government wishes to emphasize that the Revised General Act for the Pacific Settlement of International Disputes adopted by the General Assembly on 28 April 1949 already seems to cover part of the same ground as the Commission's

draft. Thus, chapter III of the General Act deals with the arbitration of non-legal disputes, while the Commission's draft seems to apply to both legal and non-legal disputes. The Swedish Government doubts the advisability of establishing identical rules for the arbitration of these two types of disputes. It might be preferable to draw some distinctions, in particular with regard to the legal and other rules on the basis of which the arbitral tribunal will give its awards. The Swedish Government reserves its position on this particular point as well as on the more general question of the relation between the General Act and a possible future convention.

#### 9. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

*Letter from the permanent delegation of the United Kingdom to the United Nations*

[27 February 1953]

The United Kingdom Government have studied with interest the draft code on arbitral procedure prepared by the International Law Commission at its fourth session in 1952, and wish to congratulate the Commission on the results achieved. The United Kingdom Government find themselves in very general agreement with the provisions of the draft code, subject to the comments made below on articles 9 and 29 to 32.

The United Kingdom Government approve in particular the attitude taken up by the Commission in the paragraphs of the report which were numbered 17 to 20 in the form in which the draft code appeared in the report of the Commission covering the work of its fourth session (A/2163).

The United Kingdom Government also strongly support the line taken by the Commission in basing itself on the second of the two conceptions set out in the paragraph of the report numbered 24 in the same document—that is to say, that judicial arbitration is based on the necessity of provision being made for safeguarding the efficacy of the obligation to submit the case to arbitration in all cases in which it may happen that, after the conclusion of the arbitration agreement, the attitude of the parties threatens to render nugatory the original undertaking.

As regards article 9 of the draft code, and while the United Kingdom Government have no objection whatever to the terms of this article, it appears to them to be based on the assumption that the natural method of submitting a dispute to arbitration where there are no prior provisions which suffice for the purpose, is by means of a *compromis*. Generally speaking, however, the method of submission by means of a *compromis* is only employed where no prior obligation to submit the dispute to arbitration exists and the obligation is created by an agreement to that effect which at the same time defines the dispute to be submitted to arbitration. In many cases, however, the obligation to arbitrate arises from the fact that a treaty or convention, either a general multilateral one or a bilateral one, on some subject or other, contains a provision for arbitration of any disputes that may arise concerning the interpretation or application of the treaty or convention. In such cases, the usual, and in many ways the preferable, method of submitting the matter to the tribunal would be by a complaint on the part of one of the parties which would then be answered by the other party, this being followed by further pleadings, written and oral, as

might be ordered by the tribunal, and no question of any *compromis* would arise. This is also the normal method of procedure in disputes brought before the International Court of Justice except in those cases where the parties, not being bound by an acceptance of the Court's compulsory jurisdiction under article 36 of the Statute, go before the Court by agreement, or where, although they are so bound, they prefer to submit the dispute in the form of a *compromis*. In all other, and in the great majority of cases, the proceedings are begun by a written application addressed to the Registrar by one of the parties.

It would seem that article 9 might be modified to take account of this position.

The United Kingdom Government also have some doubts as to the wisdom of articles 29 to 32 of the draft code. Generally speaking, it is highly desirable that an award once given should be final, and should not be open to revision or annulment even on the part of the International Court of Justice. These articles would undoubtedly offer great encouragement to the losing party to attempt to get the case reopened in one way or another. As regards article 29, since cases are seldom taken to arbitration except with full knowledge of all the facts, it is rare indeed that any material fact comes to light subsequent to the award, but it would nevertheless be a comparatively simple matter to allege the discovery of such a fact and to seek a revision.

As regards the grounds given for challenging the validity of an award under article 30, these seem to be dangerously wide. For instance, (a) "that the tribunal has exceeded its powers" will enable any decision of the tribunal as to its competence or jurisdiction to be automatically reopened. Again, (c) "that there has been a serious departure from a fundamental rule of procedure" raises the question what is a "fundamental" rule of procedure and what constitutes a "serious" departure from it. Finally, as regards (b), "that there was corruption on the part of a member of the tribunal", the position is that members of international tribunals are chosen with such care that it seems scarcely necessary to provide specially for the unlikely event of a lack of integrity on the part of one of them.

For these reasons, the United Kingdom Government do not consider that the advantages to be gained by the possibility of revision or annulment can outweigh those to be gained from finality, and they consider that any provision for revision or annulment might well lead to an intolerable extension of arbitral proceedings which in any event tend to take up a good deal of time.

#### 10. UNITED STATES OF AMERICA

*Comments of the Government of the United States of America transmitted by a note verbale dated 11 March 1953 from the permanent delegation of the United States to the United Nations*

As the Commission states in the last paragraph of the Introduction to the draft, the basic philosophy underlying the draft is that an agreement to arbitrate will be made subject to judicial enforcement. In view of practices generally followed by States up to the present time, the draft prepared by the Commission represents an effort in the progressive development of international law. In instances where frustrations of an agreement to arbitrate have proved impossible, that result has been due to special clauses of a compulsory nature having been included in the original agreement. Because of the history and practice in the field of international

arbitration, there may be a wide reluctance on the part of States at this time to enter into a convention along the lines of the one drafted by the International Law Commission, intended to cover all types of cases. However, in any event the work of the International Law Commission will have positive value as a statement of desired goals in the field of arbitration, giving added emphasis to the settlement of disputes by arbitration rather than by coercive means.

The draft may also have immediate value for States not willing to accept it *in toto* at this time, e.g., as a model from which certain articles could be taken for inclusion in future arbitration agreements in which it is felt desirable to make an agreement to arbitrate effectively binding. In working over the draft in preparation for its presentation to the General Assembly, the International Law Commission may wish to bear this in mind. It might wish to modify the present draft in certain respects. It might wish also to draft a set of shorter and simpler articles which could serve as models for inclusion in future arbitration agreements where the parties desired that the agreement should be subject to judicial enforcement.

The following comments relate to specific articles of the draft:

#### *Article 2, paragraph 1*

If States which are not parties to the Statute of the International Court of Justice will be invited to adhere to the final draft on arbitral procedure, provision will have to be made to meet the requirements of paragraph 2 of article 35 of the Statute of the Court. This could be accomplished by adding the following penultimate sentence to paragraph 1 of article 2 of the draft: "If a party to the dispute is not a party to the Statute of the Court, such party shall comply with the conditions laid down by the Security Council in pursuance of paragraph 2 of article 35 of the Statute".

#### *Article 3*

The procedure contemplated for the selection of arbitrators may be unnecessarily complex. The steps contemplated by paragraphs 2 and 3 might perhaps be eliminated. Such a revision would also entail changing the fourth paragraph by making the first clause read: "If either party fails to make the necessary appointments under the preceding paragraph", and by eliminating the clause that reads: "or if the governments of the two States designated fail to reach an agreement within three months".

In the Commission's draft it is not entirely clear that each of the three-month periods are used in paragraphs 1, 3 and 4 is cumulative. Note should also be taken of the fact that the draft does not contain provision for the contingency wherein States are under the obligation to pursue other procedures, or have previously invoked other procedures.

#### *Article 4, paragraph 1*

It is provided that "The parties having recourse to arbitration may act in whatever manner they deem most appropriate". It is felt that this proposition either is not descriptive of the desired result or is too broad. At best, its language is vague. In order to link this provision with the provision which follows, namely, "they may refer the dispute to a tribunal consisting of a sole arbitrator or of two or more arbitrators as they think fit", it is suggested that a colon be substituted for the semicolon, now separating the two provisions, or that the first quoted provision be deleted as surplusage.

#### *Article 4, paragraph 2*

It is suggested that the word "however" is unnecessary and should be eliminated.

#### *Article 5*

In providing that a party may not, after the "proceedings" have begun, replace an arbitrator designated by it, the article seems unnecessarily restrictive. For example, the arbitrators might convene merely for the purpose of organizing and adopting rules of procedure and then adjourn for a considerable period to enable the parties to prepare their pleadings and briefs in accordance with the rules. No reason is perceived why an arbitrator might not be replaced during such a period. It would seem sufficient to provide that a replacement may not be made after the completion of the written pleadings and the beginning of oral arguments, if any, except by agreement of the parties. A change of this nature in article 5 would also necessitate a slight change in the wording of paragraph 1 of article 7.

#### *Article 7, paragraph 2*

It is suggested that the following sentence be added at the end of the paragraph: "Appointment of a replacement shall be subject to the provisions of article 3".

#### *Article 7, paragraph 3*

It is believed that the words "over the objection of a member of the tribunal" are implied, but should be made explicit, after the phrase "should the withdrawal take place".

#### *Article 8*

It is suggested that after the word "decision" in both paragraphs 1 and 2 of article 8 the words "as to disqualification" be added. This would avoid any ambiguity as to whether "decision" might be construed to mean "decision in the dispute", rather than "decision as to disqualification".

The Commission might also wish to consider the addition of a third paragraph to the article: "The replacement of disqualified arbitrators shall be subject to the provisions of article 3".

#### *Article 9 (h)*

It may be impractical in many instances for the parties to fix in advance a period within which awards must be rendered. This is particularly true with respect to the general arbitration of a large number of pecuniary claims accumulated over a long period of years.

#### *Article 16*

It is felt that the jurisdiction sought to be conferred on the arbitral tribunal under the proposed draft is too broad. There should be some limitation to prevent the tribunal from deciding issues that neither party may desire to have decided, e.g., issues which have previously been determined.

The Commission might wish to consider the following wording for article 16: "For the purpose of securing a complete settlement of a particular dispute, the tribunal may decide on any counter-claim arising out of the immediate subject-matter of the dispute".

#### *Article 28, paragraph 2*

It is suggested that a provision be included making the decision of the International Court of Justice binding on the parties.

#### *Article 29, paragraph 4*

The comment regarding article 28, paragraph 2, is also applicable here.

11. URUGUAY

*Letter from the Ministry for External Relations  
of Uruguay*

[Original: Spanish]  
[8 July 1953]

I have the honour to send you herewith, . . . the comments of the Faculty of Law and Social Sciences and of the Uruguayan Institute of International Law, concerning the "Draft on arbitral procedure".

Although the final date fixed for receiving opinions has expired, it was considered that the reports of those bodies might usefully be communicated.

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*Report by Dr. Eduardo Jiménez de Aréchaga, Profes-  
sor of Public International Law, Faculty of Law and  
Social Sciences*

Montevideo, 23 March 1953

On 17 March last, the Council over which you pre-  
sided requested me to report on the draft on arbitral  
procedure prepared by the International Law Commis-  
sion of the United Nations, concerning which the Min-  
istry for External Affairs has asked for the official  
opinion of the Faculty of Law and Social Sciences.

In my opinion, the Faculty of Law should advise  
the Government of the Republic to give this draft its  
strongest approval and support.

By historical vocation and constitutional precept  
(article 6 of the Constitution) Uruguay is a resolute  
supporter of arbitration for the settlement of inter-  
national disputes.

Nevertheless, the provisions of the arbitration treaties  
concluded by our country have serious technical and  
legal defects. They are, in fact, true promises to con-  
tract (*pacts de contrahendo*), since although the par-  
ties agree to submit any dispute which may arise to  
arbitration, the treaties do nothing to facilitate the con-  
stitution of the tribunal and the determination of the  
concrete points to be decided, after the dispute has  
arisen. The parties must again reach agreement in  
two instances: first, on the determination of the points  
in dispute which will be the subject of the award and,  
secondly, on the choice and constitution of the tribunal.

The bilateral treaties which have been ratified do not  
establish or prescribe any means of overcoming obsti-  
nate opposition by one of the parties, either to the de-  
termination of the points to be settled or to the choice  
or constitution of the tribunal. It is to be feared that  
after the dispute has arisen, a party desirous of pre-  
venting the arbitration agreed upon will interpose every  
kind of obstacle; this assumption has been borne out  
by recent experience.

In the disputes which arose concerning the violation  
of human rights in Hungary, Romania and Bulgaria  
(case of Cardinal Mindzenty) these States evaded the  
undertaking to arbitrate included in the respective peace  
treaties, by the relatively simple expedient of refusing  
to appoint their representative on the tribunal. The  
United States, France and the United Kingdom asked  
that the tribunal should be composed of their represen-  
tatives, the neutral third member to be appointed by the  
Secretary-General of the United Nations.

The International Court of Justice gave an advisory  
opinion against this claim, however, based on an ex-

cessively literal interpretation of the word "third", in  
its ordinal and chronological sense; it held that the  
appointment of the two representatives of the parties  
must take place before the third representative could  
be appointed. This interpretation is certainly incorrect,  
since the word "third" is here used in its legal, not in  
its ordinal or chronological acceptance. The meaning is  
that of "third party" in the law of procedure, as op-  
posed to a "party": one who is disinterested or neutral  
in the dispute, not one who takes third place or comes  
third in order. This opinion of the Court was tanta-  
mount to stating that, failing an express provision in the  
text of the arbitration treaty itself, the tribunal could  
not be constituted and the undertaking to arbitrate  
would therefore fall to the ground if one of the parties  
to the treaty merely refused to appoint its representa-  
tive on the tribunal or to co-operate in constituting it.  
It will be understood that this view raised most serious  
problems concerning the future of the whole system of  
arbitration treaties and, in general, of pacific settlement  
of disputes now in force. This opinion of the Court  
could lead directly to an attempt to give an optional  
character (*si voluerit*) to most of the treaties in force  
on conciliation, arbitration and other means of pacific  
settlement, including those of vital interest to our coun-  
try.

Fortunately, the reaction against this tendency has  
found expression in the magnificent draft of the Inter-  
national Law Commission, the main author of which  
was Mr. Scelle, the eminent French internationalist.

The provisions of this draft transform treaties into  
something more than promises to contract: they pro-  
vide for automatic constitution of the tribunal, the  
*quasi-compromis* and "unilateral citation" by applica-  
tion, so that further agreement after a specific dispute  
has arisen, which is always difficult, is rendered un-  
necessary. Our country has, on various occasions, advo-  
cated formulas of this kind, such as those included in  
the Pact of Bogotá, which may possibly not come into  
force. In my opinion, the Government should not only  
support the formula under consideration against the  
attacks and objections to which it is sure to give rise,  
but should also uphold the view that some of its provi-  
sions are already in force as rules codifying positive  
international law and are therefore applicable even  
without any express stipulation to that effect in existing  
treaties.

For instance, the above-mentioned case of one of the  
parties failing to appoint its representative on the con-  
ciliation commission or arbitral tribunal is not provided  
for in most of the existing treaties on pacific settlement  
of disputes, because it is a phenomenon that had not  
previously appeared. This *ex parte* appointment is a  
right or privilege and, as such, its exercise is optional  
and may therefore be waived. A study of comparative  
law would seem to show that the domestic legislation of  
most civilized countries contains legal rules or maxims  
corresponding to article 538 of our Code of Civil Pro-  
cedure which lays down that when arbitration is pre-  
scribed, the arbitrators shall be appointed by the judge  
in the event of failure or refusal of the parties to do  
so. If this is so, this rule constitutes a general prin-  
ciple of law recognized by civilized nations and can be  
applied in accordance with Article 38 of the Statute of  
the International Court of Justice as an existing rule  
to supplement or interpret a treaty.

In short, the draft under consideration should be sup-  
ported, because it is based on the thesis that a State

which has entered into an undertaking to submit disputes to arbitration cannot evade that undertaking by the simple expedient of refusing to perform the acts stipulated which are necessary for fulfilment of the main obligation. It is a rule of good faith between individuals as between States, that anyone who has undertaken to follow a certain line of conduct is also bound to carry out the subsidiary acts essential for that purpose.

A report on the draft in question issued by the Uruguayan Institute of International Law, which was drawn up by Dr. Juan Andrés Ramírez, expresses similar views in support of the proposed rules, with which I entirely agree, subject to two minor reservations. In this report it is considered preferable, in the event of withdrawal of an arbitrator after the proceedings have begun, for the vacancy to be filled in the same way as normal vacancies. It should be remembered, however, that the history of arbitration shows that withdrawal of an arbitrator is always due to the fact that the party which appointed him has discovered that he is going to rule against it. His replacement as for normal vacancies would favour that State, by making it necessary to start the proceedings again and delaying and obstructing the award. On this point, I prefer the formula recommended in the draft, by which the remaining members render the award. In any case, the consent of the neutral member would always be required before an award could be rendered, and this provides sufficient safeguards.

The report of the Institute of International Law also raises the objection that no time limit is set for challenging the validity of an award on the ground of corruption of a member of the tribunal so that the award remains open to annulment indefinitely.

Further recent events, however, show the wisdom of this provision, under which an award may be challenged at any time on the basis of facts which, by their very nature, usually come to light many years afterwards.

For instance, as recently as July 1949, it became possible to publish the revelations of the United States lawyer Otto Schoenrich about the way in which the award was rendered in the frontier dispute between Venezuela and British Guiana, fifty years previously. These revelations are based on the confidential notes left by the lawyer Severo Mallet-Prevost, with the request that they should not be published until after his death. He was convinced that the President of the tribunal and the neutral arbitrator, the famous Russian internationalist F. de Martens, was induced to rule in favour of Great Britain as the result of an understanding between the two European Powers.

## II

*Report by Dr. Juan Andrés Ramírez, Vice-President of the Uruguayan Institute of International Law*

Montevideo, 9 March 1953

I am returning to your Ministry the draft rules on international arbitration formulated by the International Law Commission of the United Nations, concerning which the opinion of our Institute has been requested.

The Institute considered this question at one of its recent sessions and approved the following report:

"Having examined the draft on arbitral procedure prepared by the International Law Commission of the United Nations, I consider it worthy of approval, subject to the proposal of a few amendments.

"There is no doubt that the determination of the procedure to be followed by tribunals for arbitration between nations may, and should, be regarded as an essential condition for effective arbitration. It may well be affirmed that in this respect the saying of Benjamin Constant that forms are the guardian angels of the law still holds good and it is clear that, if the forms governing the operation of arbitral tribunals are not clearly laid down, a party accepting arbitration in bad faith or becoming dubious of the result during the proceedings could make an award impossible by repeated procedural incidents.

"Nevertheless, the draft—and in my opinion this is one of its merits—in most cases leaves the parties to agree on the procedure and it is only when they fail to reach agreement on this subject that it lays down compulsory rules.

"These rules are comprehensive, since they cover the procedure from the time when doubt or disagreement arises as to the existence of a dispute or as to whether it is within the scope of the obligation to have recourse to arbitration, up to application for revision or annulment of the award and the consequences of the judgment declaring it invalid (articles 29 to 32); and throughout this procedure, which is laid down in considerable detail, whenever an obstacle arises which might impede the regular course of arbitration, the solution applied is compulsory submission of the matter to the International Court of Justice.

"The rest of the draft pays due attention to the appointment of the arbitrator or arbitrators, giving priority to agreement between the parties and providing additional procedure in the event of failure to reach agreement.

"I do not agree with the provision contained in article 3 since, in my opinion, the matters dealt with are too important to be entrusted to a member of the International Court of Justice and not to that institution as such.

"I consider particularly wise, however, the precautions taken in the draft (articles 5 to 18) to ensure the immutability of the arbitral tribunal and prevent a party to a dispute, which foresees or expects that the tribunal will rule against its claims, from being able to change the composition of the tribunal by exerting influence or provoking incidents to complicate the proceedings.

"For this reason, the replacement of arbitrators is permitted only in exceptional cases specifically mentioned in the text.

"The draft provides for a case in which an arbitrator who has been withdrawn is not replaced and lays down (article 7, paragraph 3) that upon the request of one of the parties, the remaining members of the tribunal shall have power to render the award; I consider this system unsatisfactory and prefer replacement in the manner prescribed for other cases of vacancy.

"With regard to the annulment of the award (articles 30-32), I consider it open to objection that a time limit of sixty days is fixed for applications based on the tribunal exceeding its powers or a serious departure from a fundamental rule of procedure, while no such limit is fixed for applications based on corruption of a member of the tribunal. I think that a longer period should be allowed than the sixty days

prescribed for the other cases, since an arbitral award on matters which must be presumed to be of capital importance cannot be left open to annulment indefinitely.

"Such is my opinion on the draft submitted for comment."

I repeat that the Institute approved this report, but it made one amendment. With regard to the withdrawal of an arbitrator, it took a stand between that of the

draft and that of the party referring that the party which appointed the arbitrator should be allowed a certain period of time to replace him and that the remaining members of the tribunal should be empowered to act only if the replacement is not effected within that period.

It was also agreed that if any member of the Institute present at the meeting subsequently had any suggestion to make, he would forward it to the Ministry.

## ANNEX II

### Comments by governments on the draft articles on the continental shelf and related subjects prepared by the International Law Commission at its third session in 1951<sup>20</sup>

#### 1. BELGIUM

*Comments of the Government of Belgium transmitted by a note dated 1 March 1953 from the permanent delegation of Belgium to the United Nations*

[Original: French]

The fact that a considerable number of countries have taken unilateral measures to regulate the exploration and exploitation of the submarine platform and of the epicontinental waters above that platform shows the desirability of determining the law of nations with regard to such exploitation.

The same importance attaches to the régime of territorial waters, the consideration of which was given priority by the International Law Commission.

The two problems have certain aspects in common.

A study of the International Law Commission's preliminary draft on the continental shelf and related subjects (A/1858) calls for the following comments:

The Belgian Government attaches great importance to articles 3, 4 and 5 of part I of the draft, because their purpose is to safeguard the freedom of the high seas.

It admits that this freedom cannot be absolute and that internationally accepted measures should be taken, both with regard to the exploitation of submarine wealth and with regard to fishing outside territorial waters.

It considers that international bodies should be appointed to delimit both submarine continental shelves and fishing zones in the high seas. These bodies should be advisory only and should endeavour to promote international agreements on the régimes to be set up. The Belgian Government is opposed to the proposal in part II, article 2, notes 3 and 5, of the draft. The bodies concerned cannot exercise legislative powers over States, which can be bound only by international conventions accepted by them.

The following further comments may be made with regard to the draft.

#### PART I

##### Article 1

Since the term "continental shelf" is rightly not used in its geological sense, it would seem better not to use it at all and to describe this zone by the term "submarine areas".

This gives a better definition of the scope of the article, for it does not apply to the waters which cover these areas and over which no State can exercise an exclusive right.

If these areas are delimited with reference to the

depth at which the exploitation of the natural resources of the sea-bed and the subsoil is possible, up to a maximum depth of 200 metres, the nature of the submarine areas will be adequately defined.

##### Article 2

It is essential to maintain the definition of the control and jurisdiction exercised by the riparian State, namely, that such control and jurisdiction should be exercised exclusively with a view to the exploration and exploitation of the submarine areas. Any idea of sovereignty must be rejected.

##### Articles 3, 4 and 5

These articles, which lay down freedom of navigation, fisheries, airspace and the establishment of submarine cables, must be retained, otherwise, the principle of control and jurisdiction over submarine areas will not be acceptable.

##### Article 6

The meaning of the words "must not result in substantial interference with navigation or fishing" should be defined. Although the exploitation of the subsoil might not interfere with fishing, or with the activities of fishermen, it might reduce or even completely destroy certain species of fish in the localities concerned.

The International Law Commission's proposal might be taken as a basis for discussion. It seems to mean that exploitation would be permitted only if it did not interfere with navigation and fishing, obstruct the traffic on maritime routes, and pollute or disturb fisheries.

As at present worded, article 6 may give the impression that no previous notification is required from the State which begins exploration or exploitation. This question should be clarified and some authority should be designated with power to decide whether the conditions of article 6 have been observed and to refuse permission if necessary.

The safety zones (article 6, paragraph 2) should be delimited in the article itself, to avoid any infringement of freedom of navigation and fishing.

##### Article 7

Legal provisions should be laid down as a basis for arbitration and for possible recourse to the International Court of Justice in connexion with disputes on the delimitation of the respective submarine areas of two neighbouring countries.

In the absence of an agreement on delimitation between the countries concerned, the submarine areas of two neighbouring States might be delimited by the prolongation of the line separating their territorial waters, and those of two States separated by water by the median line between the two coasts.

<sup>20</sup> See Official Records of the General Assembly, Sixth Session, Supplement No. 9, document A/1858.

PART II

Article 1

It should be understood that no measure for regulating and controlling fishing on the high seas adopted unilaterally by one State can be invoked against the fishermen of another State. Any regulation contrary to this principle, which is the corollary of that of the freedom of the high seas, is inadmissible.

Article 2

As has been said above, it is useful to appoint advisory international bodies. Nevertheless, in view of the variety of the problems which arise in some fishing areas, it does not seem advisable to assign these advisory powers to a single body. It would be desirable to consult regional bodies or councils. In the case of Europe, such matters might be referred to the International Council for the Exploration of the Sea.

Article 3

Each government should adhere strictly to the principle of the freedom of the high seas and understand that it can only reserve fishing for its nationals in its own territorial waters. Sedentary fisheries cannot constitute an exception to this principle, except in cases where a certain part of the high seas has in fact been used for such fishing for a long time and such use has not been formally and persistently opposed by other States, which might have valid objections in view of their geographic situation. Even so, such fishing should be carried on in such a way as to interfere as little as possible with the principle of the freedom of the high seas (Gidel).

Article 4

It is essential to define in this article the base line from which the twelve-mile limit is to be measured. This base line should be that recognized for determining the limits of territorial waters. The question of base lines should be dealt with in an international agreement after the problem of territorial waters has itself been studied.

2. BRAZIL

*Letter from the permanent delegation of Brazil to the United Nations*

[5 March 1952]

The Brazilian Government, by Decree No. 28.840, of 8 November 1950, proclaimed its control and jurisdiction over the continental shelf, considered as an extension of the national territory. The Decree does not establish any specific delimitation of the continental shelf. The right of free navigation on the superjacent waters is expressly recognized by the Act of the Brazilian Government.

After carefully studying the work accomplished by the International Law Commission, my Government wishes to praise the Commission for the thoroughness and quality of the research it undertook on such a new and controversial matter, where customary law and international practice are still lacking. The Brazilian Government accepts, in principle, the conclusions reached by the International Law Commission, embodied in the draft articles, and regards them as a very valuable contribution for the future definition of the international régime of the continental shelf. Although in general agreement with the Commission, we

beg leave to comment on two points which my Government considers of paramount importance.

In regard to article 1, my Government feels that the Commission should further explore the possibility of establishing, at least on a provisional basis, a more precise limit for the continental shelf. As a matter of fact, the International Law Commission itself recognized in paragraph 198 of the report covering its second session (A/1316) that "the area over which such a right of control and jurisdiction might be exercised should be limited".

Regarding article 2, the Brazilian Government feels that the word "exclusive" should be inserted before the word "purpose". This would avoid possible doubts and would give better expression to the points of view of the members of the Commission, as stated in paragraph 1 of the commentaries to the same article. If the members of the Commission felt that the "control and jurisdiction over the continental shelf should be exercised *solely* for the purpose stated" we can see no objection to inserting the word "exclusive" in the phraseology of the article.

Apart from those two points, the Brazilian Government, as stated above, finds itself in agreement with the draft articles prepared by the International Law Commission, reserving the right to present any further comments and to propose any other modifications to the text it may deem fit when the matter will be ready for discussion at the General Assembly.

3. CHILE

*Comments of the Government of Chile, transmitted by a letter dated 8 April 1952 from the permanent delegation of Chile to the United Nations*

[Original: Spanish]

The Government of Chile congratulates the Commission on having prepared draft articles on the highly-specialized subject of the continental shelf.

This Government, however, feels bound to object to some of the provisions of these draft articles, particularly in regard to:

- (1) The legal concept of the continental shelf;
- (2) The nature of the rights which may be exercised by a State over the submarine shelf adjacent to its territory;
- (3) The legal status of the waters overlying the seabed and subsoil; and
- (4) Subjects related to the continental shelf.

1. LEGAL CONCEPT OF THE CONTINENTAL SHELF

Geographically and geologically, the expression "continental shelf" is generally taken to mean the submarine area contiguous to the national territory, lying at a depth of not more than 100 fathoms (185 to 200 metres), and forming a single morphological and geological unit with the continent.

Is it therefore necessary to make the recognition of a coastal State's rights depend upon the existence of a continental shelf as understood and defined by geology? In other words, are States with abruptly shelving coastlines, without a gently-sloping shelf descending, sometimes almost imperceptibly, to a depth of 200 metres, to be excluded from all jurisdiction over the sea-bed and subsoil bordering upon their deep-sea water?

These doubtful points of theory have been cleared up in the draft articles prepared by the United Nations International Law Commission.

According to article 1 of the draft, "... the term 'continental shelf' refers to the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil".

The depth limit of 200 metres has been eliminated from the definition and replaced by the modern legal idea that the sea-bed and subsoil may be exploited.

As the commentary on article 1 so properly remarks, technical developments in the near future might make it possible to exploit intensively the natural resources of the sea-bed and subsoil, whatever the depth of the superjacent waters.

The origin of the International Law Commission's article may be found in the Commission's 1950 report, the relevant passage of which reads as follows:

"The Commission took the view that a littoral State could exercise control and jurisdiction over the sea-bed and subsoil of the submarine areas situated outside its territorial waters with a view to exploring and exploiting the natural resources there. The area over which such a right of control and jurisdiction might be exercised should be limited; but, where the depth of the waters permitted exploitation, it should not necessarily depend on the existence of a continental shelf. The Commission considered that it would be unjust to countries having no continental shelf if the granting of the right in question were made dependent on the existence of such a shelf".

(United Nations: Report of the International Law Commission; *Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316)*, New York, 1950, page 22).

According to the authoritative opinion of Mr. J. P. A. François, the Netherlands jurist, acceptance of the geological conception of the continental shelf would mean inequality amongst States and unfair discrimination against a State whose continental shelf did not go beyond the limits of its territorial waters.

The International Law Commission's conclusions on this point appear to the Chilean Government to be correct and acceptable, for geology, while it may influence law to some extent, cannot impose principles upon it.

## 2. RIGHTS OF A STATE OVER THE ADJACENT SUBMARINE SHELF

The International Law Commission would not grant the coastal State full sovereignty, but only a limited and special form of jurisdiction, over this very special area.

Article 2 of the draft provides that "The continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources".

Apparently the Commission refrained from using the word "sovereignty" in order to avoid the implications of its acceptance on the status of the superjacent waters.

The conclusions of the International Law Commission on this point are unrealistic and are out of harmony with the usual international practice.

The Governments of Mexico, Argentina, Chile, Peru, Costa Rica, Guatemala, Honduras, El Salvador, Nicaragua, Brazil and Ecuador have all, at different times, made unilateral statements of their positions on this matter, declaring categorically that their rights over the submarine shelf contiguous to their national territory amount to more than mere "control" or "jurisdiction", and are proper to or inherent in sovereignty and dominion.

Thus the Chilean Official Statement of 23 June 1947 declares that "The Government of Chile confirms and proclaims its *national sovereignty* over all the continental shelf adjacent to the continental and island coasts of its national territory, whatever may be their depth below the sea, and claims by consequence all the natural riches which exist on the said shelf, both in and under it, known or to be discovered". (Memoria del Ministerio de Relaciones Exteriores, 1947, page 204.)

Similar concepts are expressed in the statements issued by the other American Governments just mentioned.

There are various reasons to justify sovereignty and dominion over the continental shelf as this is now understood.

In the first place, this area is actually an extension and a part of the national territory; it should therefore be subject to the sovereignty of the State of whose territory it is an under-sea extension in the same way as the rest of that territory.

As Mr. Miguel Ruelas so justly remarks, the continental shelf belongs to the coastal State, because generally the rivers of that State have brought down the rich deposits which cover the coastal area of the shelf (See Miguel Ruelas, "*La Cornisa Continental Territorial*". *Revista de Derecho Internacional*, year IX, Vol. XVII, January-June, 1930, page 130).

In the second place, the security and the right of self-preservation of the coastal State have some importance. These fundamental rights include the right of a State to dispose of and use its national territory in all possible ways.

To deny a coastal State the right of sovereignty and jurisdiction over the continental shelf is equivalent to denying it part of the national territory with which, as an international entity, it came into being. In other words, that State will be deprived of a source of wealth which, sooner or later, given the natural rate of growth of all communities, it will wish to use and dispose of as owner.

The right of self-preservation has another aspect, namely, the action necessary to repel aggression and to avert imminent danger.

The claim by a nation that its continental shelf should be subject to its exclusive sovereignty, dominion and jurisdiction lessens that danger and the probability of disputes between nations.

A strong foreign nation, desiring to exploit actually or ostensibly the resources in the waters adjacent to the territorial waters of a State might set up installations or other appropriate equipment which would not only decrease the natural resources in a way prejudicial to the coastal State, but also positively threaten the security and territorial integrity of that coastal State.

In the third place, fisheries are still a vital necessity and an element of the problem, since if the deep-sea

fishing grounds, which are usually over those areas, are left at the mercy of the first comer, the species will be depleted.

Finally, Chile is so situated geographically that both the waters and the submarine areas in question are absolutely necessary to its survival.

Furthermore, the theory of the extension of sovereignty over the continental shelf and the superjacent waters is confirmed by international practice.

For all these reasons the Government of Chile feels obliged to reject article 2 of the draft and to suggest that the principle that *sovereignty, dominion and jurisdiction over the continental shelf are vested ipso jure in the coastal State* should be confirmed.

### 3. LEGAL STATUS OF WATERS OVERLYING THE SEA-BED AND SUBSOIL

Under the draft prepared by the United Nations International Law Commission the waters overlying the continental shelf have the legal status of high seas, with all its consequences. Surface navigation and fishing rights can therefore only be restricted to the degree absolutely necessary for exploring and exploiting the resources of the sea-bed and subsoil.

With regard to installations constructed on the high seas for the purposes already indicated, the Commission considers that safety zones may be established round them but should not be classed as territorial waters.

The subject is dealt with in articles 3, 4, 5 and 6 of the draft. Under these articles the rights which may be exercised by the coastal State over the waters overlying the sea-bed and subsoil of the continental shelf do not conform exactly to the concept of sovereignty. If the theory propounded by the International Law Commission is accepted, the coastal State will have only very partial and special jurisdiction over the high seas—i.e., it will be entitled to exercise only control and supervision.

The principles accepted by the International Law Commission lead to a manifest contradiction; whereas, as we have already suggested here, the continental shelf should be subject to sovereignty, i.e., to the total jurisdiction of the State whose territory extends beneath the sea. Thus the sea-bed and subsoil would be subject to the dominion and sovereignty of the coastal State, while over the superjacent waters that State would only exercise restricted rights of an economic and administrative nature, which might well give rise to conflicts of jurisdiction.

These principles should therefore be brought into line with a realistic rule or system which would safeguard the rights of the coastal State.

Whenever a rule is needed to settle disputes between nations, jurisprudence produces one which, under the test of time, is confirmed if satisfactory and amended or superseded if not.

In this belief the Government of Chile would reject articles 3, 4, 5 and 6 and propose their replacement by a new provision proclaiming that *the sovereignty of a coastal State extends to its continental shelf and to the superjacent high seas*, subject to the limitations imposed by international law to ensure the innocent and peaceful passage of the ships of all nations and the establishment and maintenance of submarine cables.

This theory of sovereignty, adopted by the Government of Chile, appears to be borne out by the practice

of certain States. The Governments of Argentina, Chile, Peru, Costa Rica, Honduras and Nicaragua, in proclamations dated respectively 11 October 1946, 23 June 1947, 1 August 1947, 27 July 1948, 28 January 1950 and 1 November 1950, have categorically claimed the sovereignty of their States over the continental shelf adjacent to their coasts and over the superjacent waters to the extent required to guarantee to those States ownership of the resources therein contained.

### 4. SUBJECTS RELATED TO THE CONTINENTAL SHELF

#### A. Resources of the sea and sedentary fisheries

The problem of the continental shelf is closely linked with that of the conservation of resources of the sea. The International Law Commission has accordingly prepared three articles based on the former practice of international law by which, as a corollary to the freedom of the seas, no State could reserve to itself absolutely and as against all other nations a monopoly of hunting and fishing in any part of the "free" or "high" seas.

That used to be the international law or rule, but the principle of the freedom of the seas must be re-examined in the light of the present facts.

The seas are in reality dominated, used, and—it may almost be said—possessed by States maintaining powerful navies, fishing and merchant fleets, bases, supply ports, docks and shipyards. The nationals of those States are the only persons who fully enjoy all the privileges of the "freedom of the seas".

Such a state of affairs has a direct bearing on the area of the territorial sea, as it would not suit the major sea Powers to have the territorial waters, where international custom has recognized the exclusive right of the coastal State to fish and hunt, increased in area.

It is a well-known fact that fishing fleets under the direct control of the great sea Powers engage in activities prejudicial to the States bordering upon the Pacific coast.

The American community could not remain indifferent to such acts, and since 1945 there has grown up the practice of protecting, conserving, regulating and supervising the operation of fishing and hunting, in order to prevent the diminution or exhaustion, by illicit activities such as those mentioned, of the considerable resources of the seas of those areas, which are indispensable to the well-being and progress of the American peoples.

On 28 September 1945, the President of the United States of America formulated a new doctrine when he issued a proclamation accompanied by an executive order, declaring the right of his country to establish fisheries conservation zones in the high seas areas contiguous to the coasts of the United States, either exclusively or in agreement with other States concerned.

In an Official Declaration dated 23 June 1947, the President of Chile, on the basis of existing doctrine and of similar measures taken by Mexico and Argentina, laid down the following:

"2. The Government of Chile confirms and proclaims its national sovereignty over the seas adjacent to its coasts whatever may be their depths, and within the limits necessary to reserve, protect, conserve and exploit the natural resources of whatever nature found on, within and below the said seas, placing within the control of the Government es-

primarily all fisheries and hunting activities with the object of preventing the exploitation of natural riches of this kind to the detriment of the inhabitants of Chile and to prevent the spoiling or destruction of those riches to the detriment of the country and the American continent.

"3. The demarcation of the protection zones for hunting and deep sea fishing in the continental and island seas under the control of the Government of Chile will be made in virtue of this declaration of sovereignty at any moment which the Government may consider convenient, such demarcation to be ratified, amplified or modified in any way to conform with the knowledge, discoveries, studies and interests of Chile as required in the future. Protection and control are hereby declared immediately over all the seas contained within the perimeter formed by the coast and the mathematical parallel projected into the sea at a distance of 200 sea miles from the coasts of Chilean territory. This demarcation will be calculated to include the Chilean islands, indicating a maritime zone contiguous to the coasts of those islands, projected parallel to those islands at a distance of 200 sea miles around their coasts.

"4. The present declaration of sovereignty does not disregard the similar legitimate rights of other States on a basis of reciprocity, nor does it affect the rights of free navigation on the high seas". (*Memoria del Ministerio de Relaciones Exteriores*, 1947, page 203.)

Other countries followed our example—Peru in 1947, Costa Rica in 1948, and El Salvador and Honduras in 1950—using in their declarations on the subject terms very similar in form and content to those in the Chilean proclamation. All this is ground enough for saying that the doctrine that the State may establish exclusive zones of control and protection of maritime fishing and hunting in areas of the high seas contiguous to its territory known as "continental seas or waters" has become part of the American international system.

The Government of Ecuador promulgated on 22 February 1951 a Maritime Fishing and Hunting Act, article 2 of which extends the territorial seas to a distance of twelve sea miles outward, subject to any future definition of the term jurisdictional waters of the Republic of Ecuador (see *Registro Oficial*, year III, No. 747, page 6149).

If we turn from the practice of States to recently-concluded multilateral treaties, we find the same tendency to limit hunting and fishing on the high seas.

Article 9 of the Treaty of Peace with Japan obliges that country to conclude agreements regulating and limiting fishing on the high seas.

For these reasons the Government of Chile is obliged to scrutinize articles 1, 2 and 3 of part II of the draft prepared by the United Nations International Law Commission, and believes that there should be a reaffirmation of the right to establish an exclusive hunting and fishing zone 200 sea miles wide.

This measure, which the Chilean Government supports, is based on the following reasons: (1) the special configuration of the submarine shelf along the coasts of Chile; (2) the exploitation of the fisheries, which are of vital concern to Chile; (3) the inadequacy of three miles of territorial sea for protecting the fishing industry and preventing destruction of marine life; and (4) the improper jurisdiction exercised

in the past and present by certain foreign vessels over Chilean fishermen, whose living comes mainly from the sea.

#### B. *Contiguous zones*

By the term "adjacent zone" or "contiguous zone", international law recognizes the existence of a maritime belt or area between the high seas and the territorial waters over which a coastal State may exercise certain limited rights of a generally administrative nature relating to sanitary and customs control, safety of navigation and the protection of fishing.

Its legal nature should not be confused with that of the territorial sea, which is a part of the territory of the coastal State and therefore subject to its sovereignty. The total jurisdiction of the coastal State is exercised over the territorial sea, but it has only partial and special powers over the contiguous zone.

In the draft prepared by the United Nations International Law Commission the contiguous zone appears as a belt of the high seas, contiguous to the territorial sea, over which the coastal State may exercise the control necessary to prevent infringement within its territory or territorial waters of its customs or sanitary regulations and any attack on its security by foreign vessels. According to article 4 of the draft, the breadth of the zone may not exceed twelve nautical miles measured from the coast, a much less favourable provision than that of the draft prepared in 1929 at Harvard University, in which the contiguous zone may be of any width. (Draft of Convention on Territorial Waters, article 20; the text appears in *Supplement to the American Journal of International Law*, volume 23, April 1929, page 245.)

Moreover, how can these twelve miles be reconciled with the vast extent of ocean prescribed in article 4 of the Inter-American Treaty of Reciprocal Assistance, an area of sea classified by doctrine as a contiguous zone?

The limit adopted by the International Law Commission seems contrary to the new tendency in international law not to give the zone an exact or well-defined limit but rather to consider the jurisdiction which the coastal State must exercise on the high seas.

The Government of Chile considers that the limit prescribed in article 4 of the International Law Commission's draft should not be established, but that the contiguous zone should be extended and broadened so that the coastal State may take the steps necessary to prevent, within its territory or territorial waters, infringement of its customs, fishing or sanitary regulations and attacks on its political or economic security by foreign vessels.

The Government of Chile believes that this zone should be at least 100 nautical miles measured from the coast.

#### 4. DENMARK

##### *Communication from the permanent delegation of Denmark to the United Nations*

NOTE: By a *note verbale* to the Secretariat, dated 13 May 1952, the Permanent Delegation of Denmark to the United Nations transmitted the following "comments and viewpoints of Danish experts". The *note verbale* stated that "the Danish Government wishes to reserve its final position, until it has been given the opportunity to review the points of view of other countries as well as the formulation of the final result of the existing international co-operation in this matter".

The draft is considered a proper basis for negotia-

tions on this subject. It is considered particularly valuable that it has succeeded in obviating the difficulties involved by the controversial question of the extent of territorial waters. By refraining from fixing any definite geographical limit to the extent of the shelf into the sea, differences of opinion have been precluded on that point. The avoidance of any reference to sovereignty in the established sense of the word is another useful aspect of the draft which refers only to an exclusive right to exploration and exploitation without involving, for instance, the question of the status of such areas during conditions of war and neutrality. The Danish authorities would find it appropriate that the right of the coastal State as set out in part I, article 2, be expressly characterized as an exclusive right since that would preclude any idea of expansion of the territory of the State concerned.

The media through which the draft thus reaches a practicable arrangement cannot, however, be considered a final solution to the problems as far as Denmark is concerned. In the Baltic, where there is no deep sea, the system outlined in the draft will necessitate agreements with the other Baltic Powers, and such agreements are likely to encounter difficulties and may perhaps prove impracticable. On the west coast of Denmark, the application of the principle of control and jurisdiction as far as possibilities of exploitation exist might also lead to conflicts of interest with other countries.

The draft, therefore, gives occasion for certain comments involving questions of principle as well as various individual aspects:

For the special conditions existing off the Danish coasts, part I, article 7, prescribes that two or more States to whose territories the same continental shelf is contiguous shall establish boundaries by agreement; failing agreement, the parties are under obligation to have boundaries fixed by arbitration, involving—according to the commentaries—a possible recourse to the International Court of Justice.

This alternative, however, is not practicable in all cases. In the first place, not all States would be willing to abide by a solution of that nature; more particularly, some of the countries which would be involved by the areas in question are known to be opposed thereto as a matter of principle. But even when the question is to be referred to arbitration or to a court, a solution would seem unlikely, unless the treaty itself already contained certain directives or guiding principles, since these problems involve entirely new aspects which can hardly be decided according to existing legal or political principles. In this connexion, the commentaries admittedly refer to a decision *ex aequo et bono* by which the court may, to some extent, disregard existing law or the fact that the existing law contains no definite rules or guiding principles. Nevertheless, this expression has certain bearings upon a legal or a general moral evaluation, but provides no guidance for decision of entirely new technical problems or political pretensions.

Hence, the Danish authorities would find it desirable that the treaty itself should provide for a body composed of experts which could submit proposals for such delimitations, possibly with some form of appeal or recourse to arbitration or to a court. This body might consist of, for instance, three non-partisan expert members, one appointed by the Security Council of the United Nations, one by the General Assembly, and one by the President of the International Court of Justice.

The decisions of this body should be reached on the bases of directives laid down in the treaty. Should a State interested in the decision find that such directives had not been complied with, or that the decision was otherwise unreasonable, it should be entitled to refer that question to a court of arbitration established by the parties or, failing this, to the International Court of Justice which should have authority to decide the aspects specifically mentioned in the treaty, and possibly to refer the matter back to the expert body for reconsideration if the circumstances were found to warrant such action.

In regard to the directives mentioned above, the commentaries already refer to the median line, and where this line is applicable, such reference is fully approved by Denmark. Cases may occur, however, where a median line is not directly applicable, for instance, because the interests in the exploitation of the shelf are more or less at right angles to each other; in such cases reference could be made to a solution according to the bisector.

Furthermore, it is felt desirable that the points of view referred to on page 71 of the rapporteur's second report were expressly incorporated into the treaty, namely, the reference to a line perpendicular to the coast drawn from the point at which the frontier between the territorial waters of the two countries reaches the high seas. If such a boundary between the two territorial waters of two countries has previously been fixed according to a line of demarcation which can be prolonged towards the high seas, such prolongation should be indicated as the starting point for the line of demarcation also on the continental shelf.

However, in some cases an area may have to be divided between three or more countries. In such cases reference may be made to planes forming the locus of the points which are closer to one of the countries than to any of the others.

Such directives or guiding principles would establish a basis for a solution in cases where agreement among the interested countries could not be reached, while the absence of such principles may entail differences of opinion and disputes which the draft intends to obviate.

Having regard to the basic principles of the draft in connexion with the above comments, the Danish authorities have prepared the enclosed sketch<sup>21</sup> of a division of the shelf contiguous to the Danish coasts facing the North Sea and the Baltic and the waters between them. This sketch is primarily based on the boundaries fixed on 3 September 1921 between Danish and German territorial waters east and west of Jutland, and the boundary fixed by agreement of 30 January 1932 between Danish and Swedish waters in the Sound and the prolongation of these lines combined with the median line, where the latter is applicable, and otherwise based on planes forming the locus of points closer to Denmark than to any other country involved. The sketch might serve as an illustration of a division under concrete conditions calling for special solution; the principles outlined may also be applicable to analogous cases in other geographical areas.

Concerning the actual exploitation of the sea-bed and the subsoil, part I, article 5, expressly states that the new arrangement shall not prevent the laying and maintenance of submarine cables by other States. It

<sup>21</sup> Not reproduced.

is assumed that this provision refers to cables not only for telecommunication but also for transmission of power and the like. The Danish authorities are in full agreement with this provision. With the present formulation it may be doubtful, however, which of the two interests shall be overriding or, in other words, whether a State may be required to move the cable or, vice versa, whether a cable can be laid even where this is at variance with an exploitation intended by the coastal State. It would seem natural here to distinguish between cables already existing, in which case a removal, if any, should probably entail a compensation for the expenses incidental to such removal, and to the laying of new cables which should be effected in such a way as not to interfere with steps for exploitation of the sea-bed already taken by the coastal State. Also where other installations are involved which have already been placed by other States, for instance, the mooring of lightships and the like, some regard should be had to arrangements existing already.

On the other hand, the commentaries indicate that this provision shall not be extended to pipelines, which is probably intended to mean the laying of new pipelines. However, other types of installations may be placed on the sea-bed and, in the view of the Danish authorities, it would therefore be desirable to have it expressly established that the exclusive right recognized for the coastal State (see the remarks to part I, article 2 above) shall cover any other exploitation of the sea-bed and the subsoil, with submarine cables as the only exception, for instance the right to cultivation (algae and other marine plants), establishment and maintenance of permanent installations for exploitation of the sea-bed, including the fixing of permanent stakes and other fishing devices, stone-gathering and pearl-fishing on the sea-bed, etc., so that other States could not in any case, apart from submarine cables, use the sea-bed or the subsoil without the consent of the coastal State, with the explicit recognition that the exclusive right comprises all such forms of exploitation.

With respect to part II, articles 1 and 2, the following comments may be made:

The Danish authorities take a favourable view of the efforts expressed in these articles to provide possibilities for the conservation and control of fishing on the high seas in such geographical areas where adequate preservation and control have not been established already. Moreover, it is acknowledged that, in areas where only few countries take part in fishing, such countries have a primary interest in the enforcement of provisions of this nature. It is felt, however, that such States should not be in a position where they could use the initiative that would have to be left to them for these purposes to establish priority for their own fishermen to the exclusion of fishermen from other countries who might later wish to take part in such fishing activities. Such priority would, in fact, be feasible even if the arrangement formally placed all countries taking part in such fishing on an equal footing, if for instance the permissible fishing methods did not have the same value to fishermen of other countries—or could not be used at all. (In this connexion, reference is made to the procedures which in some cases have rendered illusory the application of the most-favoured-nation clause). Hence, it would be essential to clarify the issue as to when and under what conditions any countries arriving later should be entitled to participation in the establishment of new

regulations in order that, if agreement cannot be reached, such countries should not have to be governed by previously adopted provisions for an indefinite period. It is therefore suggested that procedures should be established for application if provisions for preservation and control have already been adopted by a certain number of countries for a geographical area in which other countries later wish to take part in the fishing activities and consider the provisions already established to be at variance with their interests, or consider the control applied to be inadequate.

In regard to the international body referred to in article 2, the Danish authorities wish to point out that it has been charged with two different tasks, viz., to make regulations where interested States are unable to agree among themselves, and to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them.

In the former respect it is pointed out that Denmark is in agreement with the principle of an international regulation of fisheries in cases of disagreement among the interested parties, but a final attitude to the draft proposal cannot be decided upon until the composition and organization of the proposed body is known in greater detail. It should be noted, however, that such regulation could, to a large extent, probably be undertaken by existing international agencies such as the International Council for the Exploration of the Sea.

In regard to the function of the body referred to in article 2, in respect of investigations, it should also be noted that in the opinion of the Danish authorities the existing international bodies, such as the International Council for the Exploration of the Sea, have functioned satisfactorily and that their activities have provided valuable experience and practical working methods; hence, it would not be desirable at the present time to replace the existing bodies by one single international body. The Danish authorities therefore propose that the body referred to in article 2 should conduct its investigations in consultation with the existing international bodies and in geographical areas where such investigations are not already being carried out by existing international bodies.

In regard to part II, article 3, the Danish authorities refer to their comments on part II, article 1, and point out that it would be natural for coastal States to have an exclusive right to place permanent installations for sedentary fisheries on that part of the high seas that is contiguous to the territorial waters of such State, analogous to the exclusive right of coastal States to place installations for exploitation of the coastal State's part of the continental shelf as stated above. It would also be desirable to ensure free navigation by adding a provision to the effect that sedentary fisheries must not result in substantial interference with navigation, cfr. a similar provision in part I, article 6, concerning the exploration and exploitation of the continental shelf.

The commentaries of the International Law Commission define sedentary fisheries as fishing activities carried out by means of stakes embedded in the sea-floor. Such stakes, it is presumed, are placed during the fishing season and then removed, whereas the establishment of permanent installations, as already mentioned, should be reserved for the coastal State. Sedentary fisheries, it is noted, can be undertaken also by devices other than stakes, e.g., buoys and anchors.

The following comments refer to part II, article 4 of the draft proposal:

The Danish authorities appreciate the potential need for establishment of contiguous zones adjacent to territorial waters where a coastal State may exercise the control necessary to prevent the infringement, within its territory, of customs, fiscal or sanitary regulations. The limit of twelve miles from the coast fixed for such zones is also acceptable to the Danish authorities.

It has been noted with satisfaction that no extension of territorial waters is involved.

Some concern is felt, however, about the absence of a specific definition of the nature of the control in question, since this may lead to abuse by the institution of meticulous control measures on navigation and fisheries where such control is not required to prevent infringement of customs, fiscal and sanitary regulations. Abuses of this type might, in point of fact, be tantamount to an expansion of territorial waters.

The Danish authorities feel, therefore, that contiguous zones should not be established unilaterally by a coastal State, but only by treaties between the interested States.

## 5. ECUADOR

*Comments of the Government of Ecuador transmitted by a note verbale dated 30 January 1952 from the permanent delegation of Ecuador to the United Nations*

[Original: Spanish]

The Government of Ecuador has the honour to express the following views:

*Article 1:* The concept of the continental shelf or continental platform, as contained in this article, is qualified by two conditions: that the shelf be outside the area of territorial waters, and that it admit of the exploitation of the sea-bed and subsoil.

This concept is not entirely in accord with articles 1 and 2 of the Legislative Decree of 6 November 1950 approved by the National Congress of Ecuador, which does not subject the continental shelf to these two conditions. Our continental shelf, which is limited to submerged land contiguous to continental territory where the depth of the superjacent waters does not exceed 200 metres, lies partly within and partly beyond the area of territorial waters. Nor does its existence depend simply upon whether the depth of the superjacent waters admits exploitation of the natural resources of the sea-bed and subsoil, as stipulated in the International Law Commission's formula. The Act says simply that the continental shelf or platform contiguous to Ecuadorean coasts, "and all or any part of the wealth it contains, belong to the State . . .". The Commission will only recognize the continental shelf if its natural resources can be exploited; in Ecuadorean law the right of exploitation is inherent in the recognition of the State's jurisdiction over the shelf.

*Article 2* limits the coastal State's jurisdiction over the continental shelf to the sole purpose of exploiting its natural resources. Although our law begins by laying down that the Ecuadorean State "shall exercise the right of use (*aprovechamiento*) and control to the extent necessary to ensure the conservation of the said property and the control and protection of the fisheries appertaining thereto", it does not limit the State's

jurisdiction to the exploration and exploitation of the shelf's natural resources.

*Article 3:* The Commission regards the waters covering the continental shelf as high seas. It is bound to do so, for by its definition the continental shelf is outside the area of territorial waters. However, under our law the superjacent waters may be high seas in some cases and territorial waters in others.

*Article 4* deals with the legal status of the airspace above the superjacent waters of the continental shelf. As a logical consequence of the preceding article, the Commission regards that airspace as free. However, from article 2 of the Legislative Decree of 6 November 1950 and from our Constitution it follows that the airspace over the superjacent waters of the continental shelf may be free in some cases and territorial in others.

*Article 5* entitles the coastal State to lay and maintain submarine cables on the continental shelf in virtue of its jurisdiction over the shelf. We have no comparable provision in our law on the subject, but clearly Ecuador may do any act and take any measures whatsoever within the confines of its own territory, which includes the continental shelf where the superjacent water is not more than 200 metres deep.

*Article 6* indicates that freedom of navigation and fishing must not be hampered by exploration of the continental shelf and exploitation of its natural resources. There is no comparable provision in our law, but it is easily gathered that where the Ecuadorean continental shelf extends beyond territorial waters, the principle in the Civil Code that fishing in the sea is free prevails. Where the Ecuadorean shelf ends within the area of territorial waters, the matter is governed by the principle in the Civil Code that only Ecuadoreans and aliens domiciled in Ecuador may fish in territorial waters, and by the provisions of the Sea Fishing and Hunting Act relating to foreign vessels.

The relevant provisions of that Act are as follows:

## FISHING BY FOREIGN VESSELS

*Article 20.* No foreign fishing vessel may enter Ecuadorean territorial waters unless carrying a certificate, a fishing permit and the other necessary documents.

*Article 21.* Certificates and fishing permits shall be obtainable only from the regular (*de carrera*) consulate of Ecuador having jurisdiction over the applicant vessel's port of departure, or, where no regular consulate has jurisdiction over the port of departure, from the regular consulate nearest to the vessel's course.

Fishing documents shall be issued after payment of the duties and fees prescribed in the relevant Acts and regulations and subject to a full and unconditional written undertaking by the applicant to abide by the provisions of those Acts and regulations.

*Article 22.* Any foreign vessel wishing to engage in commercial fishing in territorial waters or to purchase fish must register beforehand at the Ecuadorean consulate prescribed in the preceding article.

Fishing certificates shall be valid from the date of issue until 31 December the same year.

*Article 23.* A vessel in Ecuadorean waters wishing to continue to fish after the expiry of its fishing permit may obtain a permit by wireless. Application may be made only to the Ecuadorean consulate that issued

the original permit, and the wireless message granting the permit shall import all the wording of a written permit.

A fishing vessel on the high seas wishing to fish in Ecuadorean waters may apply for a fishing permit by wireless, provided that it has already secured a certificate from the proper consulate and obtains the fishing permit before entering Ecuadorean waters. Otherwise it shall be deemed to be trespassing.

*Article 24.* A fishing permit shall be valid for a single voyage, that is to say from the moment of issue until the vessel enters port to dispose of its catch or trans-ships the catch to another vessel.

*Article 25.* A fishing permit shall be valid for

(a) One hundred days, if the vessel obtained it from an Ecuadorean consulate in California or the Gulf of Mexico;

(b) Eighty days, if the vessel obtained it from an Ecuadorean consulate in Central or South America;

(c) Eighty-five days, if issued by wireless from an Ecuadorean consulate in California or the Gulf of Mexico; and

(d) Seventy-five days, if issued by wireless from an Ecuadorean consulate in Central or South America.

A vessel prevented from fishing by *force majeure* or fortuitous circumstances duly substantiated may, if no fish are aboard, obtain without paying a further fee an extension of its fishing permit for a period equal to the one expired.

*Article 26.* A catch may be trans-shipped only in the cases specified in the regulations made under this Act.

*Article 27.* An Ecuadorean consulate issuing fishing documents in accordance with the provisions of this Act shall forward to the Ministries of National Economy, National Defence, and Foreign Affairs, the Treasury and the Comptroller-General's Department a monthly return of fishing developments together with the statistical information required by the regulations made under this Act, and shall retain a copy thereof on file.

*Article 28.* Any foreign fishing vessel engaged in commercial fishing or coming to purchase fish from Ecuadorean fishermen shall pay in United States dollars the following fishing duties and fees:

(a) For the certificate:

	\$
Swordfish .....	200
Tunny .....	200
Shark .....	200
Cod .....	100

(b) For the permit, per net registered ton:

	\$
Swordfish .....	20
Tunny .....	12
Shark .....	12
Cod .....	8
Cod fillets .....	24

Commercial freighters calling at Ecuadorean ports shall pay only the ordinary export duties on fish taken aboard for their own account or that of another.

*Article 29.* Vessels coming to fish for sport shall pay the sum of one United States dollar (gold)

per gross ton for each visit plus the usual consular fees, but must apply to the proper consul for a special permit.

Fishing permits for scientific purposes shall be issued free of charge upon application to the Director of the Department of Fishing and Hunting.

*Article 7* prescribes how two States having territories to which the same continental shelf is contiguous shall establish boundaries. As there is no express provision in our law governing this situation, we should be entitled to establish such boundaries by bilateral treaty.

*Related subjects. Resources of the sea. Articles 1 and 2.* These articles refer to the competence of States whose nationals are engaged in fishing in any area of the high seas to regulate and control fishing activities in such an area; and to the competence of a permanent international body to conduct investigations of the world's fishing areas and the methods employed in exploiting them.

Because our Civil Code recognizes the principle that fishing in the sea is free, there are no provisions comparable to the Commission's draft articles 1 and 2 in either the Legislative Decree of 6 November 1950 or the Sea Fishing and Hunting Act and Regulations. The same comment may be made on article 3, which authorizes States to regulate the establishment of fishing communities in areas of the high seas contiguous to territorial waters.

*Article 4.* This article authorizes a coastal State to exercise the control necessary to prevent the infringement, within its territory or territorial waters, of its customs or fiscal regulations.

The right to police for national security and fiscal purposes was established by our Civil Code and Maritime Police Code for a distance of four marine leagues, but the Legislative Decree of 6 November 1950 set the area of maritime control and policing at twelve nautical miles, i.e., the minimum for territorial waters. The area of maritime control and policing may be extended by virtue of such international treaties as the Treaty of Mutual Assistance.

## 6. EGYPT

*Comments of the Government of Egypt transmitted by a note verbale of 5 March 1953 from the permanent delegation of Egypt to the United Nations*

[Original: French]  
[February 1953]

The Egyptian Government has examined with great interest the draft articles on the continental shelf and related subjects prepared by the International Law Commission at its third session in 1951. While, in view of the importance and complexity of the problems involved, it wishes to reserve its final position, it feels able to make the following comments at this juncture:

(1) In the first place, the Egyptian Government wishes to commend the International Law Commission for its report on the question, which constitutes a valuable contribution to the codification of maritime law.

(2) As regards part I—Continental Shelf: the Egyptian Government considers that the definition of the continental shelf given in article 1 is clearly inadequate. Although the difficulties referred to by the Commission in this connexion are real, it should be possible and would be desirable to have a more concrete defini-

tion of the continental shelf. The proposal for the use of a specific depth—to be determined in the light of the circumstances—might serve as a basis, subject to any subsequent technical developments which might make it possible to exploit the resources of the sea-bed at a greater depth and which might therefore necessitate a revision of the definition.

(3) The Egyptian Government further considers that the concept of "control and jurisdiction for the purpose of exploring (the continental shelf) and exploiting its natural resources" contained in article 2 might be replaced by the well-known concept of "sovereignty" which there is no good reason for rejecting, and which presents definite advantages from the point of view of practical interpretation. The continental shelf would simply be subject to the sovereignty of the coastal State. There is no reason to fear that the concept of sovereignty would be criticized on the grounds that it might give rise to an extension of the power and control of the coastal State, since articles 3, 4 and 5, which the Egyptian Government supports in principle, seem to offer assurances which could logically be accepted.

(4) Article 6, which is in the nature of a regulation, is acceptable. It should, however, be pointed out that the "reasonable distances" referred to in paragraph 2 should be left to be determined by each government.

(5) As regards article 7, the Egyptian Government considers it reasonable and eminently desirable that two or more States to whose territories the same continental shelf is contiguous should establish boundaries in the area of the continental shelf by agreement. With reference to comment No. 1 on the article, in which the word arbitration is used in the widest sense, including even arbitration *ex aequo et bono*, we would draw attention to the advantage of working out a set of rules to be applied in delimiting the zones of each State on the continental shelf in areas where this is necessary owing to the failure of the parties to reach an agreement. These rules might serve as an objective basis for any agreements which might be concluded between States.

(6) As regards part II—Related subjects: the Egyptian Government is unable at present to express an opinion on the question of the resources of the sea and sedentary fisheries dealt with in the first three articles of that part, the articles being at present under consideration by the competent authorities. As regards article 4, however, which relates to contiguous zones, the Egyptian Government wishes to make the most express reservations concerning the limitation of control on the adjacent high seas both as regards the purpose of such control and the provision that it should not be exercised more than twelve miles from the coast. Needless to say, the current trend is to extend the limits of territorial waters. If article 4 were adopted in its present form it would simply mean the abolition of contiguous zones.

## 7. FRANCE

*Comments of the Government of France transmitted by a letter dated 3 October 1952 from the Ministry for Foreign Affairs of France*

[Original: French]

The French Government would like first of all to pay a tribute to the International Law Commission for its efforts in studying a new and controversial topic

which is not as yet covered by international rules. It feels that the draft articles constitute a really useful working paper and a notable step towards the reconciliation of the divergent views which still prevail in this area of international maritime law. To their credit, the draft articles neither challenge the principle of the freedom of the seas, which must continue to be the basic rule, nor do they question the régime of territorial waters.

## PART I. CONTINENTAL SHELF

1. *Definition.* The Commission defines the continental shelf as the area "outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil" (article 1). The Commission intentionally refrains from adopting a fixed limit in terms of the depth of the superjacent waters.

Although the definition admittedly avoids the drawback of instability, it appears to suffer from the defect of vagueness. It is arguable that it might be better to contemplate a specified depth-limit of, say, 300 metres, to avoid having to change it too soon. A fixed limit would have the further advantage of ruling out any dispute concerning such vague concepts as the ability of the coastal State to exploit the natural resources or the period within which it should be in a position to do so.

2. *Legal status.* The provisions of draft article 2 give the coastal State "control" and "jurisdiction" over the maritime area defined as the continental shelf. One may wonder whether the distinction drawn by the Commission between the notion of "control and jurisdiction" and that of sovereignty is a real one. The legal consequence of the monopoly of exploitation vested in the coastal State will be the exercise of effective, though limited, sovereignty over the continental shelf and this sovereignty will be a fact even though the actual term is not employed.

Article 6 stipulates that "the exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation or fishing".

This wording calls for a number of comments:

(a) It would seem useful to make it clear also that the exploitation of the continental shelf should not have the effect of reducing fish production, for example, by causing the local disappearance or the general depletion of certain species.

(b) The question necessarily arises who will have the power—and when—to judge whether the action taken by the coastal State is, in effect, likely or not likely to interfere with navigation or fishing. The draft article in no way specifies what authority would be competent to refuse permission or to declare an action prohibited, or how serious the interference must be before such a decision becomes a necessity.

(c) Finally, the ability to exploit under article 6 *ipso facto* seems to imply the ability to instal pipelines. Perhaps it would be better to say so in so many words.

Note 4 to article 6, paragraph 2, refers to the possibility of establishing "narrow safety zones" extending for perhaps five hundred metres around the installations. If and when discussions are held concerning the determination of the width of such zones, care should be taken to avoid any infringement of the freedom

of navigation and fishing through the establishment of such contiguous zones.

## PART II. RELATED SUBJECTS

The main preoccupation of the draft articles in this part is to ensure better protection for the natural resources of the sea. These articles are divided into three groups: resources of the sea, sedentary fisheries and contiguous zones.

The proposals concerning the related subjects admittedly contain clearer provisions than those concerning the exploitation of the natural resources of the sea-bed and subsoil. No doubt this is accounted for by the fact that the question is not a new one and that it was possible to rely on the various studies which had preceded the preparation of the international conventions concluded in the past for regulating fishing on the high seas. Nevertheless, some of the proposed provisions are still not beyond criticism.

### 1. *Resources of the sea*

Article 1 gives each State the right to regulate fishing in any area if its nationals are engaged in fishing in that area, subject to the proviso that the measures to be taken shall be taken "in concert" if several States are involved. This is a proposition which is based on general and internationally accepted principles and which has been acted upon on previous occasions. It follows that no unilateral measure by one of the States concerned may be pleaded against the nationals of another State. The same observation applies to the situation, also covered by article 1, where the area in question is within one hundred miles of the territorial waters of a coastal State.

Article 2 provides for the possibility of establishing a permanent international body with competence not only to conduct investigations of fisheries but also to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any particular area where the States concerned are unable to agree among themselves. In the French Government's view it would be desirable to establish such a body, with powers to take regulatory, technical and economic decisions. However, there are two observations to be made in this connexion.

(1) Obviously, if practicable general regulations are to be worked out, one must envisage the contingency that one of the States might find itself in disagreement with the others. It may be recalled that when the International Convention for the Northwest Atlantic Fisheries of 3 February 1949 was being drafted, some thought was given already then to the establishment of a body of this kind to deal with all questions relating to the maintenance of the level of the stocks of fish covered by the Convention. However, as there was some opposition on this point, the Convention merely provided for the establishment of a qualified body to submit proposals for the approval of the various governments concerned. That is a first step which should perhaps be judged in the light of the experience gained before it is planned to establish an international body with powers of decision, such as that described in the draft article.

(2) It should also be pointed out that the system recommended can be useful only in so far as it includes all the interested States, for the non-participation of any one of them can prevent the proposed measures from materializing.

### 2. *Sedentary fisheries*

(1) Attention should be drawn to the vagueness of article 3, so far as the definition of the term "sedentary fisheries" is concerned. The note to this article merely states that the term means fisheries which should be regarded as sedentary because of the species caught or the equipment used. It would be absolutely necessary to delimit the scope of this definition more particularly.

(2) It should be noted that while a non-coastal State may maintain and exploit the fisheries in question on an equal footing with a coastal State, it has to be "permitted" to do so. This stipulation obviously places it in an inferior position with respect to the coastal State and deprives it of the freedom of action it enjoyed previously over a part of the high seas.

### 3. *Contiguous zones*

Article 4 has the merit of establishing a uniform limit for the zone within which a coastal State may exercise control and might therefore be useful in putting an end to many uncertainties. The French Government would therefore be prepared to give it consideration, subject to the proviso that the grant of the right of control to a coastal State can on no account be held to constitute an extension of that State's sovereignty beyond its territorial waters.

This proviso leads to another as a necessary corollary: the proposed article will only be acceptable if it is supplemented by fixing the limits of territorial waters in such a way that the power to fix them is not left to the discretion of the States concerned. The French Government feels therefore that, with respect to this fundamental point, the work of the Commission must be completed and that any attempt to make regulations governing the so-called contiguous zones presupposes that the limits of territorial waters have been fixed.

The French Government wishes to offer one final comment which relates both to the provisions dealing with the continental shelf and to those concerning the related subjects. It is to be noted that while provision is made for a system of general regulatory and policing measures, no mention is made of the conditions which are to govern the supervision of these measures. Yet the question of supervision raises a good many difficulties of a national and international character (practical methods for exercising it, financial costs, apportionment of financial responsibility, etc.) and it is difficult to take a position on any of the articles in question until some further particulars, with explanations, concerning this general problem are obtained.

### 8. ICELAND

#### *Communication from the Ministry for Foreign Affairs of Iceland*

[5 May 1952]

The Ministry of Foreign Affairs of Iceland presents its compliments to His Excellency, the Secretary-General of the United Nations and has the honour to refer to the Legal Department's note of 28 November 1951 (LEG 292/1/07) inviting the comments of the Government of Iceland upon document A/CN.4/49, containing the International Law Commission's draft articles on the continental shelf and related subjects.

The Government of Iceland has studied the draft articles referred to and has the honour to submit the following comments dealing mainly with jurisdiction over fisheries:

1. The Commission defines the term "continental shelf" as referring to the sea-bed and subsoil of the submarine areas contiguous to the coast but outside the area of territorial waters, etc. (part I, article 1). It then says that the continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources (part I, article 2) and that the exercise by a coastal State of control and jurisdiction over the continental shelf does not affect the legal status of the superjacent waters as high seas (part I, article 3).

The Commission also says that on the high seas adjacent to its territorial waters, a coastal State may exercise the control necessary to prevent the infringement, within its territory or territorial waters of its customs, fiscal or sanitary regulations (part II, article 4). On the other hand, fishing activities on the high seas (i.e., outside territorial waters) are to be regulated through agreements among the States concerned. Also, an international body should be set up and be empowered to make regulations for conservatory measures to be applied by the States whose nationals are engaged in fishing in any particular area where the States concerned are unable to agree among themselves (part II, articles 1-2). It is specifically stated that in no circumstances may an area be closed to nationals of other States wishing to engage in fishing activities (part II, article 1).

The Icelandic Government is unable to agree with these views. At the General Assembly of the United Nations, in 1949, the Icelandic delegation pointed out that it would not be sufficient for the Commission to study the régime of the high seas as proposed by the Commission itself and that it would be necessary for it to study also the other side of the problem, i.e., the question where the high seas started, or, in other words, the régime of territorial waters. In that way the entire problem, including the problem of contiguous zones would be covered. The Commission has not yet circulated its report on the question of territorial waters. Nevertheless, in its report on the régime of the high seas it seems to have prejudged the issue. For in part I, article 1, of its draft, the Commission seems to have taken for granted that the "continental shelf", as defined by it, is situated outside territorial waters. And how far do territorial waters extend? The Commission does not say.

2. The views of the Icelandic Government with regard to fisheries jurisdiction can be described on the basis of its own experience, as follows:

Investigations in Iceland have quite clearly shown that the country rests on a platform or continental shelf whose outlines follow those of the coast itself (see provisional map, p. 54) whereupon the depths of the real high seas follow. On this platform invaluable fishing banks and spawning grounds are found upon whose preservation the survival of the Icelandic people depends. The country itself is barren and almost all necessities have to be imported and financed through the export of fisheries products. It can truly be said that the coastal fishing grounds are the *conditio sine qua non* of the Icelandic people for they make the country habitable. The Icelandic Government considers itself entitled and indeed bound to take all necessary steps on a unilateral basis to preserve these resources and is doing so as shown by the attached documents. It considers that it is unrealistic that foreigners can be prevented from pumping oil from the continental shelf but that they cannot

in the same manner be prevented from destroying other resources which are based on the same sea-bed.

3. The Government of Iceland does not maintain that the same rule should necessarily apply in all countries. It feels rather that each case should be studied separately and that the coastal State could, within a reasonable distance from its coasts, determine the necessary measures for the protection of its coastal fisheries in view of economic, geographic, biological and other relevant considerations.

#### ANNEX I TO COMMENTS BY THE GOVERNMENT OF ICELAND

##### LAW CONCERNING THE SCIENTIFIC CONSERVATION OF THE CONTINENTAL SHELF FISHERIES, DATED 5 APRIL 1948

(Translation)

The President of Iceland proclaims: The *Althing* has passed the present law which is hereby approved and confirmed:

##### Article 1

The Ministry of Fisheries shall issue regulations establishing explicitly bounded conservation zones within the limits of the continental shelf of Iceland; wherein all fisheries shall be subject to Icelandic rules and control; Provided that the conservation measures now in effect shall in no way be reduced. The Ministry shall further issue the necessary regulations for the protection of the fishing grounds within the said zones. The Fiskifélag Islands (Fisheries Society) and the Atvinnudeild Haskela Islands (University of Iceland Industrial Research Laboratories) shall be consulted prior to the promulgation of the said regulations.

The regulations shall be revised in the light of scientific research.

##### Article 2

The regulations promulgated under article 1 of the present law shall be enforced only to the extent compatible with agreements with other countries to which Iceland is or may become a party.

##### Article 3

Violations of the regulations issued under article 1 shall be punishable by fines from kr. 1,000 to kr. 100,000 as specified in the regulations.

##### Article 4

The Ministry of Fisheries shall, to the extent practicable, participate in international scientific research in the interest of fisheries conservation.

##### Article 5

This law shall take effect immediately.

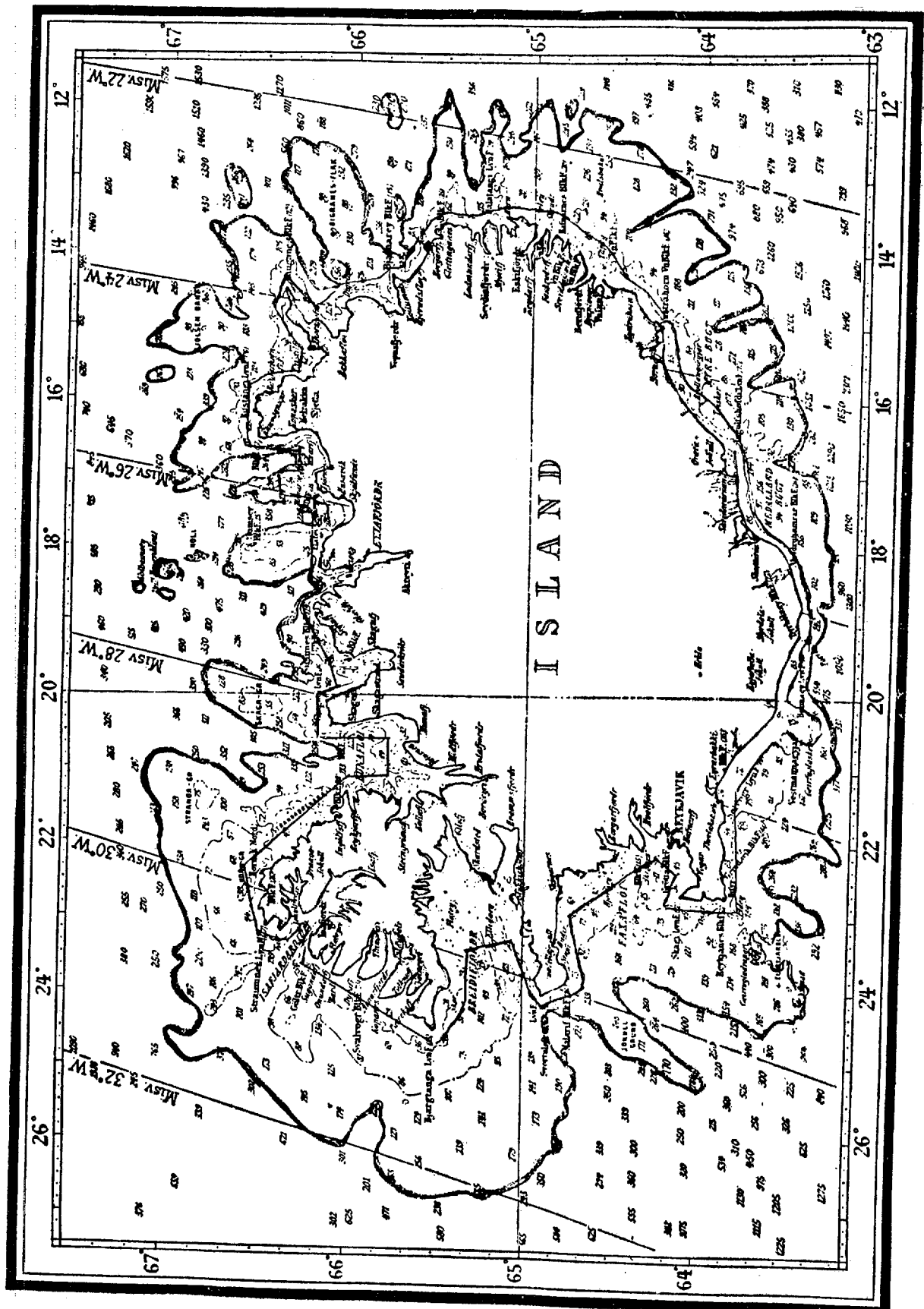
Done in Reykjavik, 5 April 1948.

(Signed) Sveinn BJORNSSON  
President of Iceland  
Johann P. Josefsson

Reasons for the law of 5 April 1948 (submitted to the Icelandic Parliament)

It is well known that the economy of Iceland depends almost entirely on fishing in the vicinity of its coasts. For this reason, the population of Iceland has followed the progressive impoverishment of fishing grounds with anxiety. Formerly, when fishing equipment was far less efficient than it is today, the question appeared in a different light, and the right of providing for exclusive rights of fishing by Iceland itself in the vicinity of her coasts extended much further than is admitted by the practice generally adopted since 1900. It seems obvious, however, that measures to protect fisheries ought to be extended in proportion to the growing efficiency of fishing equipment.

Most coastal States which engage in fishing have long recognized the need to take positive steps to prevent over-exploita-



tion resulting in a complete exhaustion of fishing grounds. Nevertheless, there is no agreement on the manner in which such steps should be taken. The States concerned may be divided into two categories. On the one hand, there are the countries whose interest in fishing in the vicinity of foreign coasts is greater than their interest in fishing in the vicinity of their own coasts. While recognizing that it is impossible not to take steps to mitigate the total exhaustion of fishing grounds, these States are nevertheless generally of opinion that unilateral regulations by littoral States must be limited as far as possible. They have also insisted vigorously that such measures can only be taken by virtue of international agreements.

On the other hand, there are the countries which engage in fishing mainly in the vicinity of their own coasts. The latter have recognized to a growing extent that the responsibility of ensuring the protection of fishing grounds in accordance with the findings of scientific research is, above all, that of the littoral State. For this reason, several countries belonging to the latter category have, each for its own purposes, made legislative provision to this end the more so as international negotiations undertaken with a view to settling these matters have not been crowned with success, except in the rather rare cases where neighbouring nations were concerned with the defence of common interests. There is no doubt that measures of protection and prohibition can be taken better and more naturally by means of international agreements in relation to the open sea, i.e., in relation to the great oceans. But different considerations apply to waters in the vicinity of coasts.

In so far as the sovereignty of States over fishing grounds is concerned, two methods have been adopted. Certain States have proceeded to a determination of their territorial frontiers, especially for fishing purposes. Others, on the other hand, have left the question of the territorial frontier in abeyance and have contended themselves with asserting their exclusive right over fisheries, independently of such a frontier. Of these two methods, the second seems to be the more natural, having regard to the fact that certain considerations arising from the idea of the "territorial frontier" have no bearing upon the question of an exclusive right to fishing, and that there are therefore serious drawbacks in considering the two questions together.

When States established their sovereignty over fishing zones in the vicinity of their coasts they adopted greatly varying limits; in the majority of cases, they adopted a specified number of nautical miles: three miles, four miles, six miles or twelve kilometres, etc. It would appear, however, to be more natural to follow the example of those States which have determined the limit of their fisheries in accordance with the contour of the continental shelf along their coasts. The continental shelf of Iceland is very clearly marked, and it is therefore natural to take it as a basis. This is the reason why this solution has been adopted in the present draft law.

*Commentary on article 1.* Two kinds of provisions are concerned: on the one hand, the delimitation of the waters within which the measures of protection and prohibition of fishing should be applied, i.e., the waters which are deemed not to extend beyond the continental shelf; and, on the other hand, the measures of protection and prohibition of fishing which should be applied within these waters. In so far as the enactment of measures to assure the protection of stocks of fish is concerned, the views of marine biologists will have to be taken into consideration, not only as regards fishing grounds and methods of fishing, but also as regards the reasons during which fishing shall be open, and the quantities of fish which may be caught.

At present, the limit of the continental shelf may be considered as being established precisely at a depth of 100 fathoms. It will, however, be necessary to carry out the most careful investigations in order to establish whether this limit should be determined at a different depth.

*Commentary on article 2.* The provisions of this article have a bearing upon the following agreements: the Agreement between Denmark and the United Kingdom, of 24 June 1901, and the International Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish, of 23 March 1937. Should the provisions contained in this draft law appear

to be incompatible with these agreements, they would not, of course, be applied against the States signatories to the said agreements, as long as these agreements remain in force.

*Commentary on article 3.* The amount of the fines will be assessed with due regard to the relative importance of the measures of prohibition which may have been infringed.

*Commentary on article 4.* On 17 August 1946, the International Council for the Exploration of the Sea recommended that measures be taken to prohibit fishing in the Faxaflói. It goes without saying that Iceland will take part, to the fullest possible extent, in any initiative of this kind in relation to her own coasts as well as others. She has already given proof of her interest in these problems, in particular by taking part in international oceanographic research.

*Article 5.* This article does not call for comment.

## ANNEX II TO COMMENTS BY THE GOVERNMENT OF ICELAND

### REGULATIONS CONCERNING THE CONSERVATION OF FISHING BANKS OFF THE NORTH COAST OF ICELAND

(Translation)

#### Section 1

All trawling and Danish seine-netting is prohibited in the area from Horn to Langanes inside four nautical miles from a basic line drawn between the outermost points of the coast, islands and rocks; in bays, the basic line is drawn across the opening of the bay.

The basic line shall be drawn directly through the following points, the conservation line being a parallel line four nautical miles seawards:

1. Horn .....	66° 27'4 N., 22° 24'5 W.
2. Irabodi .....	66° 19'8 N., 22° 06'5 W.
3. Drangasker .....	66° 14'3 N., 21° 48'6 W.
4. Selsker .....	66° 07'3 N., 21° 31'2 W.
5. Asbúgarf .....	66° 08'1 N., 20° 11'2 W.
6. Siglunes .....	66° 11'9 N., 18° 50'1 W.
7. Flatey .....	66° 10'3 N., 17° 50'5 W.
8. Lágey .....	66° 17'8 N., 17° 07'0 W.
9. Raudínúpur .....	66° 30'7 N., 16° 32'5 W.
10. Rífstangi .....	66° 32'3 N., 16° 11'9 W.
11. Hraunhafnartangi .....	66° 32'3 N., 14° 01'6 W.
12. Langanes .....	66° 22'6 N., 14° 32'0 W.

The western part of the conservation area is bounded by a line drawn due north-east from Rani in Hornbjarg and the eastern part by a line drawn due east from Langanestá.

Also, a four-mile zone shall be drawn from the outermost points and rocks of the island of Grimsey (Cf. map, p. 56).

#### Section 2

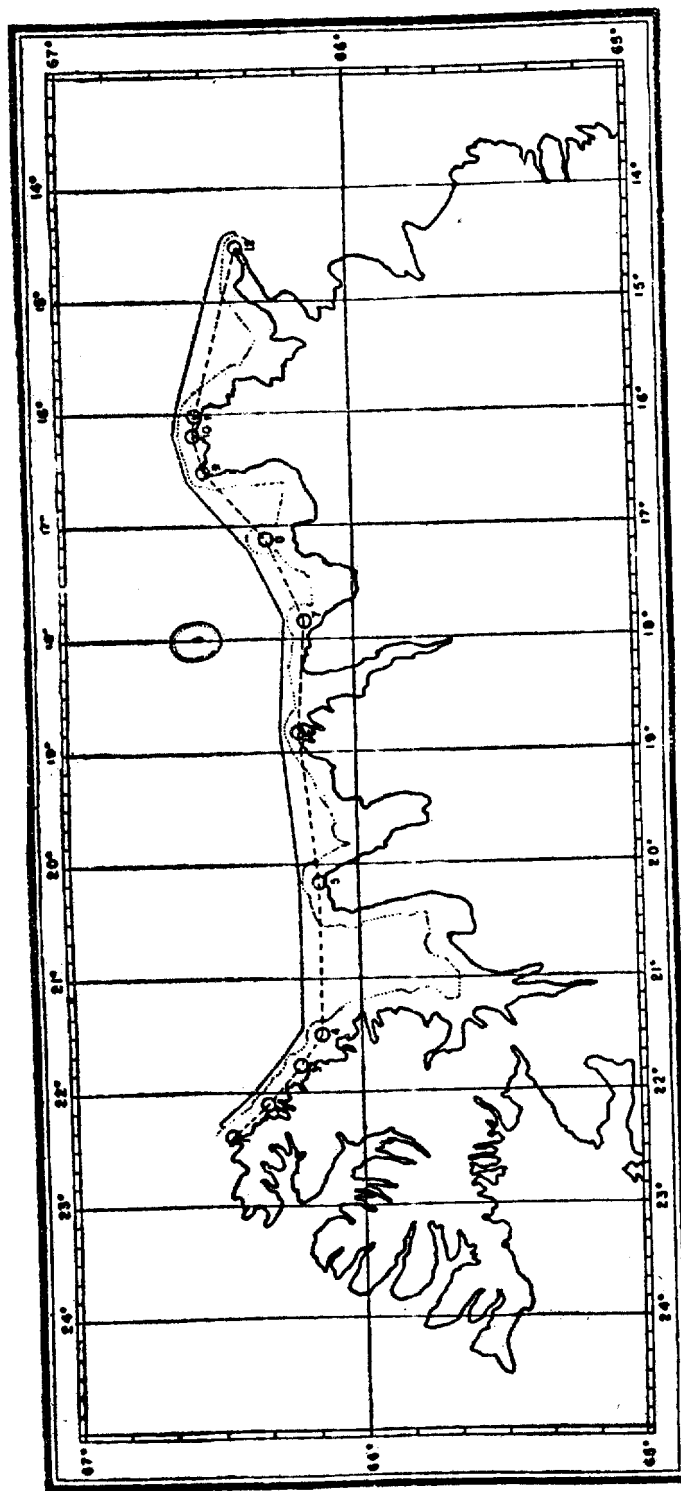
In the area defined in section 1 only Icelandic citizens may fish for herring and for such fisheries Icelandic vessels shall be used, cf. Act No. 33 of 19 June 1922 concerning fishing in territorial waters.

#### Section 3

Fishing operators, cf. section 2, who intend to engage in summer herring fisheries off the north coast during the period from 1 June to 1 October shall apply for permission to the Ministry of Fisheries before 1 June 1950, and before 15 May each succeeding year and specify in their applications the vessels and the type of fishing gear to be used.

If the Ministry of Fisheries envisages the possibility of over-fishing, the Ministry at the beginning of the herring season or later may limit the number of fishing vessels and the maximum catch of each individual vessel.

Fisheries statistics shall be forwarded to the Fiskifélag Islands (Fisheries Society of Iceland) in the manner prescribed in Act No. 55 of 27 June 1941, concerning catch and fisheries reports.





#### Section 4

The provisions of these regulations do not interfere with the freedom of navigation, provided that the fishing gear is stowed in the manner prescribed in Act No. 33 of 19 June 1922.

#### Section 5

The enforcement of these regulations shall at all times be in conformity with international agreements to which Iceland is a party.

#### Section 6

Infractions of these regulations and rules and notices published in pursuance thereof shall be punishable by fines from kr. 100.00 to 100,000.00. However, penalties provided for in prevailing laws prohibiting trawling and Danish seine-netting shall remain in force in all areas to which they have hitherto been applicable.

#### Section 7

These regulations shall enter into force on 1 June 1950.

These regulations are hereby promulgated in accordance with Law No. 44 of 5 April 1948 concerning the scientific conservation of the continental shelf fishing banks.

Ministry of Fisheries, 22 April 1950

(Signed) Olafur THORS

(Signed) Gunnlaugur E. BRIEM

### ANNEX III TO COMMENTS BY THE GOVERNMENT OF ICELAND

#### REGULATIONS CONCERNING CONSERVATION OF FISHERIES OFF THE ICELANDIC COASTS

##### Article 1

All trawling and Danish seine-netting is prohibited off the Icelandic coasts inside a line which is drawn four nautical miles from the outermost points of the coasts, islands and rocks and across the opening of bays.

The line shall be drawn by drawing straight base lines between the following points, and then a parallel line four nautical miles seawards:

1. Horn	66° 27'4 N., 22° 24'5 W.
2. Irabodi	66° 19'8 N., 22° 06'5 W.
3. Drangasker	66° 14'3 N., 21° 48'6 W.
4. Selsker	66° 07'3 N., 21° 31'2 W.
5. Asbúdarif	66° 08'1 N., 20° 11'2 W.
6. Siglunes	66° 11'9 N., 18° 50'1 W.
7. Flatey	66° 10'3 N., 17° 50'5 W.
8. Lágey	66° 17'8 N., 17° 07'0 W.
9. Raudínúpur	66° 30'7 N., 16° 32'5 W.
10. Rifstangi	66° 32'3 N., 16° 11'9 W.
11. Hraunhafnartangi	66° 32'3 N., 16° 01'6 W.
12. Langanes	66° 22'6 N., 14° 32'0 W.
13. Skálátóarsker	65° 59'7 N., 14° 37'5 W.
14. Bjarnarey	65° 47'1 N., 14° 18'3 W.
15. Almenningsfles	65° 33'1 N., 13° 40'6 W.
16. Glettinganes	65° 30'6 N., 13° 36'4 W.
17. Nordfjardarhorn	65° 10'0 N., 13° 31'0 W.
18. Gerpir	65° 04'7 N., 13° 29'8 W.
19. Hólmur	64° 58'9 N., 13° 30'7 W.
20. Setusker	64° 57'7 N., 13° 31'6 W.
21. Dursasker	64° 54'1 N., 13° 36'9 W.
22. Yztiboi	64° 35'2 N., 14° 01'6 W.
23. Selsker	64° 32'8 N., 14° 07'1 W.
24. Hvitingar	64° 23'8 N., 14° 28'1 W.
25. Stokksnes	64° 14'1 N., 14° 58'5 W.
26. Hrollaugseyjar	64° 01'7 N., 15° 58'8 W.
27. Tvísker	63° 55'6 N., 16° 11'4 W.
28. Ingólfshöfoi	63° 47'8 N., 16° 38'6 W.
29. Hvalsíki	63° 44'1 N., 17° 33'7 W.
30. Medallandssandur I	63° 32'4 N., 17° 56'0 W.
31. Medallandssandur II	63° 30'6 N., 18° 00'0 W.
32. Mýrnatangi	63° 27'4 N., 18° 12'0 W.
33. Kötutangi	63° 23'4 N., 18° 43'0 W.

34. Lundadrangur	63° 23'5 N., 19° 07'6 W.
35. Geirfuglasker	63° 19'0 N., 20° 30'1 W.
36. Einidrangur	63° 27'4 N., 20° 37'2 W.
37. Selvogur	63° 49'2 N., 21° 39'4 W.
38. Hópsnes	63° 49'3 N., 22° 24'6 W.
39. Eldeydrangur	63° 43'8 N., 22° 59'6 W.
40. Gáluvíkurtangi	64° 44'9 N., 23° 55'2 W.
41. Hraunvör	64° 49'6 N., 24° 01'0 W.
42. Skálasnagi	64° 51'2 N., 24° 02'7 W.
43. Bjargtangar	65° 30'2 N., 24° 32'3 W.
44. Kópanes	65° 48'3 N., 24° 06'3 W.
45. Baroi	66° 03'7 N., 23° 47'6 W.
46. Straumnes	66° 25'7 N., 23° 08'5 W.
47. Kögur	66° 28'3 N., 22° 55'8 W.
48. Horn	66° 27'9 N., 22° 28'5 W.

Also, a four-mile zone shall be drawn around the following:

49. Kolbeinsey	67° 07'5 N., 18° 36'0 W.
50. Hvalsbakur	64° 35'8 N., 13° 16'7 W.
51. Geirfugladrangur	63° 40'6 N., 23° 17'3 W.

Finally, a four-mile zone shall be drawn from the outermost points and rocks of the island of Grimsey (see map, p. 57).

##### Article 2

In the area defined in article 1 any other foreign fishing activities shall be prohibited in accordance with the provisions of Law No. 33 of 19 June 1922 concerning fishing in territorial waters.

##### Article 3

Fisheries statistics shall be forwarded to the Fiskifélag Islands (Fisheries Society of Iceland) in the manner prescribed in Law No. 55 of 27 June 1941 concerning catch and fisheries reports.

If the Ministry of Industries envisages the possibility of over-fishing the Ministry may limit the number of fishing vessels and the maximum catch of each vessel.

##### Article 4

Fishing operators who intend to engage in summer herring fisheries off the north coast during the period from 1 June to 1 October, shall apply for permission to the Ministry of Industries before 15 May each year, and specify in their applications the vessels to be used and the type of fishing gear used.

##### Article 5

Violations of the provisions of these regulations shall be subject to the penalties provided for by Law No. 5 of 8 May 1920, concerning prohibition against trawling, Law No. 45 of 13 June 1937, concerning prohibition against Danish seine-netting in territorial waters, Law No. 33 of 19 June 1922, concerning fishing in territorial waters, as amended, or, if the provisions of the said laws do not apply, to fines from kr. 1,000.00 to 100,000.00

##### Article 6

These regulations supersede regulations No. 46 of 22 April 1950, concerning the conservation of fisheries off the north coast.

##### Article 7

These regulations become effective on 15 May 1952.

These regulations are hereby promulgated in accordance with Law No. 44 of 5 April 1948, concerning the scientific conservation of the continental shelf fisheries, as amended by Provisional Law No. 37 of 19 March 1952.

Ministry of Industries, Reykjavik, 19 March 1952.

(Signed) Olafur THORS

(Signed) Gunnlaugur E. BRIEM

#### 9. ISRAEL

Comments of the Government of Israel transmitted by a note verbale dated 17 March 1952 from the permanent delegation of Israel to the United Nations

The Ministry for Foreign Affairs presents its compliments to the Secretary-General of the United Nations and with reference to his note No. LEG. 292/1/07

dated 28 November 1951 has the honour to submit the following comments on the draft articles on the continental shelf and related subjects prepared by the International Law Commission (A/CN.4/49). In accordance with that letter, it is noted that these draft articles are being given the publicity referred to in article 16, paragraph (g), of the Statute of the International Law Commission, and that governments are being invited to submit their comments as envisaged in paragraph (h) thereof. In connexion with this the following comments are made. Paragraph (h) envisages that governments shall submit their comments within "a reasonable time" and the Secretary-General's note dated 28 November 1951 invites such comments to be submitted by 1 March 1952. In the opinion of the Government of Israel the time limit fixed by the Secretary-General is too short, having regard not only for the importance and complexity of the issues involved, but also for the fact that although document A/CN.4/49 is itself dated 31 July 1951, it has only recently been formally circulated to governments. For this reason, and, moreover, having regard to the fact that under paragraphs (i) and (j) of article 16 of the Statute further action will undoubtedly be completed by the International Law Commission, the observations contained in this note are tentative only, the Government of Israel reserving its full right to submit further observations and if necessary to modify its point of view in the future discussions on this important subject.

2. It is observed that in its first session the International Law Commission selected the régime of the high seas as a topic for codification (see A/925, paragraph 20), a decision duly noted by the General Assembly in its resolution 374 (IV) of 6 December 1949. Progress reports on the work in this connexion were made by the Commission in its reports on its second (A/1316, part VI, chapter III) and third (A/1858, chapter VII) sessions, always in connexion with the work of codification. The note of the Secretary-General set forth at the head of the printed version of document A/CN.4/49 also refers to codification. Yet the document itself is circulated with reference to article 16 of the Statute of the International Law Commission, which relates to the progressive development of international law. Having regard for the definitions of "progressive development" and "codification" contained in article 15 of the Statute of the International Law Commission, the Government of Israel is of opinion that that aspect of the law of the high seas which relates to the continental shelf is more susceptible to progressive development than to codification. On the other hand, it has less definite views as to the more appropriate treatment for the matters contained in part II of document A/CN.4/49. True, the manner in which the Commission has treated them is rather that of progressive development than that of codification, and there are doubtless many reasons why this should be preferred. But having regard for the contents of the three reports submitted by the International Law Commission to the General Assembly and for the terms of resolution 374 (IV), the Government is constrained to note with surprise that it is now asked to submit its comments from the point of view of progressive development, and not from that of codification. This absence of clarity is the more to be regretted having regard for the valuable preliminary work which has been performed in this sphere by the International Law Commission and its special rapporteur, Professor François, as well as by the Secretariat.

3. In this connexion a suggestion on future procedure is ventured. It seems evident that in due course the articles now being considered will have to be integrated into a more comprehensive text, which will be largely codificatory. For example, all the matters discussed in document A/CN.4/49 in point of fact will stand in direct relationship with the manner, yet to be indicated by the Commission, for the determination of what it calls "Territorial Waters", and it is difficult to assess the full import of the draft articles now under discussion in isolation. Furthermore, the recent judgement of the International Court of Justice in the *Anglo-Norwegian Fisheries Case* (I.C.J. Reports 1951, page 116) also requires very careful study in order to determine its precise impact both upon the *lex lata* and upon the *lex ferenda* proposed by the Commission. In studying the whole of this branch of the law, legitimate considerations of national interest and difficult political, military, economic, legal and sociological aspects will have to be weighed and reconciled with one another. All this will require time, and the final result will gain for the time thus spent. For this reason it is suggested that the International Law Commission consider deferring further consideration of the draft articles contained in document A/CN.4/49 and the comments of governments thereon for the time being, and concentrate on completing its work of codification on the law of the high seas and territorial waters. In this connexion, it can be noted that the Commission itself regards it necessary to perform its work in phases (A/1316, paragraph 183). The Government of Israel finds itself in agreement with this approach, but believes that ultimately the whole work of the Commission on these two topics will have to be discussed as a single phase, either in the General Assembly itself or in a specially convened diplomatic conference.

For these reasons, then, the Government of Israel will in this note set forth its views on the problem of the continental shelf from the point of view of the progressive development of international law; that is to say, it will indicate what, in its opinion, should be the fundamental basis of a draft convention on a subject which has not yet been regulated by international law, or in regard to which the law has not been sufficiently developed in the practice of States.

4. The Government of Israel is inclined to agree with the suggestion advanced by the International Law Commission in draft article 1 of part I of document A/CN.4/49, that the legal definition of the concept of the continental shelf should be divorced from the geological and scientific definition. That being so, the Commission's reasons for retaining the term "continental shelf" are not seen to be convincing, and a phrase such as "submarine areas" is considered preferable. The science of the law has to work hand-in-hand with the physical sciences, for it is the application of these that makes possible the exploitation of the natural resources of the sea-bed and subsoil from which the legal interest in the matter derives. We are here dealing with a new sphere of human activity in which both the lawyer and the scientist are taking their first steps. They must work in harmony and mutual understanding, and the use by the lawyer and the scientist of identical terminology with differing connotation may lead in the future to serious misunderstandings and even disputes, and retard the healthy development of the law.

5. The Government of Israel is unable to agree to the theoretical basis for draft article 2 which, in its view, seems to deviate to too great an extent from what

are the existing principles of law governing the bed and subsoil of the sea. The starting point for the progressive development of the law is found in the proposition that the bed of the sea is traditionally regarded as *res nullius*, if not as territory incapable of being acquired by any occupier. Recent technological developments have now made possible the exploitation, not only of the bed of the sea but also of the subsoil of the submarine areas. However, such exploitation is possible only by means of technical devices installed on the territory of the coastal State to which the submarine areas are contiguous. The decisive factor on which the law must be based is the essential element of contiguity. In the present state of technical development, then, it is believed that it would be more correct to reword the basic principle explained above and indicate that the bed of the sea is to be regarded as *res nullius* capable of being acquired, not by the first occupier whoever he might be, but only by the coastal State to which the submarine areas concerned are contiguous, provided, of course, that the coastal State has the necessary intention to effect such acquisition. If it is not at present possessed of such intention, then the law should recognize that it may have an exclusive right, which it can exercise when it so desires, to acquire such areas, and that any actions by any other State prejudicial to such right must be regarded as a legal nullity governed by the rule *ex turpi causa non oritur ius*. The formulation of draft article 2 is thus seen to be unduly restrictive on two counts. In the first place, it is not clear what is the precise implication of the phrase "control and jurisdiction". In fact, and from the legal point of view, this control and jurisdiction seems to be indistinguishable from sovereignty, particularly having regard for what might be termed the non-terrestrial manifestations of sovereignty (air-space and territorial waters). Yet the phrase "control and jurisdiction" may be capable of conveying an impression of something less or different from sovereignty. It is doubtful if it would be possible to assure a satisfactory legal basis for the exploration and exploitation of the natural resources of the continental shelf unless it is recognized that the coastal State is capable of exercising full rights of sovereignty over it, and not merely what may be lesser and somewhat ambiguous rights of control and jurisdiction. In the second place, the limitation on the purposes for which these rights may be used as proposed by the International Law Commission, namely, exploration and exploitation, seems to be somewhat unduly restrictive. The coastal State may desire to exercise rights of sovereignty in other directions. One example, which springs to mind, is that of protection against abuse of rights by third States, as well as for purposes of defence. The coastal State might not be able for the time being to undertake the exploration or exploitation of the continental shelf for a variety of reasons, including such reasons as an immediate lack of the necessary financial resources, considerations of national economic policy, which may regard such exploration or exploitation as being for the present undesirable, and so forth. States finding themselves in such a position should none the less be able to acquire, by extending their sovereignty over the appropriate areas, the possibility of exploring and exploiting them at some future date, as well as the opportunity of preventing their exploration and exploitation by other States.

6. The Government of Israel finds itself in agreement with the principle underlying draft articles 3 and 4, which in its view would be equally applicable

were draft article 2 to be modified in the direction indicated in the previous paragraph of this note. Similarly, the Government of Israel has no comments to make regarding draft article 5, and draft article 6 (1). Nevertheless it is believed that the text of draft article 6 (1) may convey the notion that in some way or other rights of navigation and fishing are superior to, and have priority over, the rights of the coastal State to construct and maintain installations. This may be undesirable, for obviously the locations of the installations and their maintenance are dependent upon physical features over which the coastal State cannot exercise full control, and the facts of nature may make it necessary for the coastal State to cause substantial interference with navigation or fishing. The subject with which we are dealing contains a large element of speculation as regards future developments, and undue rigidity in the fixing of legal norms at this early stage may not be considered advantageous. The real problem is to reconcile the new conceptions with the old and not to subordinate the new to the old. Admittedly, this problem requires international regulation, which may be achieved either by an international convention or by allowing rules of customary law to develop. In either case the present discussions are likely to have a decisive influence on future developments, and this requires very careful analysis of the real problems calling for solutions.

7. In the view of the Government of Israel the formulation of draft article 6 (2) is defective in that it confuses the two distinct elements of territorial waters and protection of the installations. From the theoretical aspect it would appear to be desirable to establish that the installations do not have the status of islands from the point of view of delimiting the territorial waters of the coastal State, if it is understood by this that the coastal State is not to be able artificially to increase the general width of its own belt of territorial waters as measured from the low water mark or other defined base line, solely by means of constructing a chain or chains of such installations extending from the coast into the high seas. But to deduce from this desirable theoretical proposition that the installations themselves cannot have their own territorial waters seems to involve a *non sequitur*. Clearly the problem of the defence and security of the installations, both those emerging through the sea and those permanently under the surface of the sea, will be a difficult one, and the radius of 500 metres suggested by the Commission in its comment to the draft article seems not to have taken into account all the problems involved in this delicate aspect.

8. With regard to draft article 7, the Government of Israel is at one with the Commission on the desirability of neighbouring States agreeing between themselves as to the boundaries of their respective areas of continental shelf. Such agreements would have the legal effect of establishing a *lex specialis* in force between the parties to them. However the expression of such a desire would appear to be more appropriate to a *voeu* to be emitted by the General Assembly or the diplomatic conference which will give final consideration to the draft convention as a whole. It is not so clear that it is a correct manner of approaching the problem of codification or progressive development of international law to include in the draft articles under discussion a *pactum de contrahendo* couched in such general terms, the legal value of which is questionable. In the same line of thought it is difficult to acquiesce at this stage in a proposal put forward, it is assumed, *de lege ferenda*,

that States should agree in advance to submit certain disagreements to arbitration or judicial settlement *ex aequo et bono*. There are two main objections to this proposal in the form in which it has been put. In the first place, an agreement to proceed to arbitration or judicial settlement whether or not *ex aequo et bono*, should be placed in a general compromissory clause and then stand in a certain defined relation with the whole draft convention—and it will be recalled that in the view of the Government of Israel the draft articles here being discussed can in the last resort only be satisfactorily considered within their context in a more comprehensive draft convention relating to the status of the high seas. Secondly, and more important, it is not a necessary consequence of the draft articles actually contained in document A/CN.4/49 and the commentary thereon that even at this stage it is not possible to establish some general principles of law regarding the determination of boundaries of areas of continental shelf. The general principles of law relating to the settlement of territorial claims are relatively well developed, at all events in so far as concerns land territory, and it is felt that a document possessing a law-declaring or law-creating character such as the draft articles should proceed from a more positive attitude towards established principles of law. At least it should proceed from an examination into the problem of how far these established principles can be regarded as having application to the matter here being discussed. States have in the past shown little propensity to proceed to arbitration or judicial settlement *ex aequo et bono* in preference to such mode of settlement of disputes based on strict law, and it seems reasonable to express grave doubts as to whether the proposal of the International Law Commission is in accord, either with the manifest tendencies of States or with the tasks actually imposed upon the Commission in relation to the codification and progressive development of international law.

9. In the light of its general views as to the manner in which the International Law Commission has performed this phase of its task, as described in paragraph 2 above, the Government of Israel has considered very carefully whether and to what extent it is in a position to submit any comments on the draft articles contained in part II (related subjects) of document A/CN.4/49. With regret it has come to the conclusion that this is not possible at this stage, because of the absence of clarity as to whether these draft articles are being submitted as part of the Commission's work of codification or as part of its work of progressive development of international law. Clearly the type of comment that can usefully be made depends upon the nature of the work being performed by the International Law Commission in connexion with the topic. However, the Government of Israel finds it necessary to reserve its rights to submit further comments at a later stage.

#### 10. NETHERLANDS

*Comments of the Government of the Netherlands transmitted by a letter dated 24 March 1952 from the permanent delegation of the Netherlands to the United Nations*

[Original: French]

The Netherlands Government has been very interested to note the draft articles on the continental shelf and related subjects prepared by the International Law Commission . . .

The Netherlands Government approves of the International Law Commission's decision to study this subject. In this Government's opinion it is absolutely essential that rules of international law should be established on this subject so as to put an end to the present practice by which States issue regulations unilaterally.

The Netherlands Government endorses the principles underlying the rules proposed by the International Law Commission. Needless to say, the country of Grotius attaches particular importance to the principle of the freedom of the seas. Nevertheless the Netherlands Government is aware that these principles cannot be applied in such a way as to impede a development of law which should be considered beneficial to the whole community of nations.

The Netherlands Government is pleased to note that the Commission's draft maintains the principle of the freedom of the seas, particularly as regards navigation and fishing.

As regards the exploitation of the sea-bed and the subsoil, the draft gives adjacent States the right to exercise jurisdiction and control. The Netherlands Government is prepared to support this system.

Although in theory it might perhaps have been preferable to give jurisdiction over these submarine areas to the international community as a whole, the Netherlands Government feels that the practical difficulties of doing so would prove insuperable. Such a system would indeed make it impossible to exploit submarine resources properly in the interests of mankind.

On the other hand, the Netherlands Government would like to suggest that an international body should be established to control and advise on the progressive exploitation of the submarine areas, so as to promote the most effective use of these resources in the general interest.

The Government supports the suggestion that the International Law Commission should deal separately with the exploitation of the subsoil of the continental shelf and with fishing rights in the superjacent waters. The Netherlands Government considers that in this respect the maintenance of the freedom of the seas would benefit the whole community of States, and it is very firmly opposed to any attempt to claim exclusive fishing rights beyond the limits of territorial waters. Nevertheless, the Government does consider it necessary to take steps for the protection of fishing in the areas outside as well as within territorial waters. Indeed, the Government believes that the only way to check the ever-increasing attempts to reserve stretches of the high seas to the coastal State is to establish equally effective measures for the protection of fisheries outside territorial waters. The best way of achieving this would be through an international agreement reached by means of special conventions. Accordingly, every effort should be made to conclude such conventions as soon as possible. Even so, States will be able to evade all obligations simply by refusing to participate in such conventions. The Government is very interested to note the International Law Commission's suggestion that an international body should be set up to make, when necessary, rules binding on States. The Government considers that the subject should be given all the attention it undoubtedly deserves, since this is the only possible way of finding an effective solution to the problem.

The Government supports the idea that contiguous zones should be established for customs, fiscal and sanitary purposes.

Having made these general observations, the Netherlands Government need only comment briefly on the actual wording of the articles.

#### PART I

##### *Continental shelf*

###### *Article 1*

Although the Netherlands Government has no serious objection to this article, it wonders whether a limit of 200 metres in depth would not place the law on a surer foundation and prevent unlimited expansion in the future.

###### *Article 2*

It might perhaps be useful to emphasize that this article deals only with the "mineral resources" of the continental shelf. The same comment applies to the first sentence of the first paragraph of article 6. See also note 1 under article 3 of part II.

###### *Article 6*

The Netherlands Government wishes to emphasize from the outset that in the drafting of this article the interests of navigation should take precedence. The expression "substantial interference with navigation" is rather vague and the article does not state who shall be the judge. The article should include detailed provisions on notifications and warnings, and should in particular specify to whom the notifications are to be addressed. A penalty should be established for failure to observe such provisions. In any event there should be a guarantee that the notification would always be given before the installations were constructed. In addition, in order to protect navigation, special rules should be made to govern the equipment of the installations. Finally, a limit should be fixed for the safety zones, in view of the tendency of certain States to demand very extensive zones for security purposes.

###### *Article 7*

The Netherlands Government wishes to emphasize the advantage of an international system to regulate the delimitation of the continental shelf between adjacent States and States separated by a stretch of sea. It is not sufficient simply to express the hope that such States will reach agreement on the subject. Compulsory arbitration, as provided for in the article, might prove very useful, but it would very definitely be advisable to lay down specific rules of law upon which arbitrators could base their decisions.

#### PART II

##### *Related subjects*

###### *Article 1*

In connexion with this article also, the Netherlands Government wishes to point out that no effective solution of the problem will ever be achieved if the regulation and control of fishing in the waters above the continental shelf depends on agreement among all the States concerned, especially if—as the article states—any newcomer will be entitled to participate in making the regulations. Here again arbitration is essential, but specific

rules must be established to guide arbitrators. Clearly, therefore, it is necessary to set up a permanent international body, as is stated in article 2.

In certain respects, agencies like the Inter-governmental Maritime Consultative Organization, which are already projected, might be able to help.

###### *Article 3*

The term "sedentary fisheries" should be clearly defined.

The provision that the regulation will not affect the general status of the areas as high seas is, strictly speaking, superfluous. In any case its inclusion could not lead to an argument *a contrario* affecting contiguous zones, for which no such provision has been inserted.

###### *Article 4*

It should be stated explicitly that control may be exercised on ships entering the zone as well as on those leaving it. Similarly, it should be clearly understood that control over immigration and emigration is covered by the term "customs . . . regulations". Finally, the article should mention not only the purpose of preventing the infringement of customs regulations, but also the desirability of punishing such infringement.

#### 11. NORWAY

*Comments of the Government of Norway transmitted by a letter dated 3 March 1952 from the permanent delegation of Norway to the United Nations*

The problems which are dealt with in the draft articles are both important and complicated. The present comments are intended to be a contribution to the solution of some of these problems. They do not necessarily represent the final conclusions of the Norwegian Government.

#### GENERAL REMARKS

The draft articles make a sharp distinction between the rights of the coastal State over the resources of the sea-bed and subsoil on the one hand and of its rights over the fishery resources of the superjacent waters on the other. But are there any reasons for making such a sharp distinction? The commentaries of the draft articles do not explain in a convincing way why this should be necessary.

In paragraph 4 of the commentaries to part I, article 2, it is stated that if the continental shelf was to be regarded as *res nullius*, that might lead to chaos. It is possible that the free exploitation of the resources of the continental shelf outside the limits of territorial waters might in some cases lead to chaotic or at any rate undesirable conditions, but the same may be said of the free exploitation of the resources of the superjacent waters. Unregulated fishing may create conflicts between different fishermen. It will often expose anchored fishing gear (nets or long lines) to the danger of being destroyed by the trawlers. It will also in many cases lead to overfishing. There are good reasons why the exploitation of the resources of the sea as well as the exploitation of the resources of the sea-bed and the subsoil should be regulated and controlled. It is not clear why the control and jurisdiction should be left to the coastal State in the case of the exploitation of the resources of the continental shelf, while a quite different procedure is recommended when it comes to fisheries. It might in particular be questioned whether

the coastal States. The exploitation of the resources of the continental shelf. The exploitation of the resources of the sea-bed and subsoil might very well be regulated by the coastal State without excluding non-nationals.

The International Law Commission has stated in paragraph 6 of the commentaries to part I, article 2, that it has not attempted to base on customary law the right of the coastal State to exercise control and jurisdiction for the purpose of exploring and exploiting the natural resources of the continental shelf. As we are here faced not with a restatement or clarification of existing international law but with the question of whether new rules should be established, great caution seems to be desirable. No innovation should be made before the problems involved have all been carefully considered and discussed by all interested States.

Apart from drawing the distinction between the resources of the continental shelf and those of the sea, the draft articles also make another distinction. They put sedentary fisheries in a position which differs from that of other fisheries. This distinction does not seem to be warranted. This will be further explained below in the comments to part II, article 3.

#### PART I. THE CONTINENTAL SHELF

As it is stated above, it is not at all certain that it will be appropriate to establish a particular set of rules for the continental shelf. It has however been thought that it might be useful nevertheless to submit comments on some of the draft articles of part I.

Article 1 gives a definition of the term "continental shelf". This definition may be adequate as long as one is dealing with the continental shelves of countries bordering on the great oceans. But when several countries are contiguous to one shallow sea, the definition seems inadequate. In article 7 an attempt is made to solve the difficulty by stating that when two or more States are contiguous to the same continental shelf, they should establish borders in the area of the continental shelf by agreement. It is further said that, failing agreement, the parties are under the obligation to have the border fixed by arbitration. In the present state of international affairs it is hardly wise to give States a right of control and jurisdiction over the continental shelf, while at the same time leaving the fixation of boundaries to agreement or failing that, arbitration. If great interests are at stake, an agreement may be impossible to reach, and not all States can then be expected to be willing to submit the case to arbitration. In the commentaries to article 7 it is stated that it is not feasible to lay down rules which the States should follow for the drawing of boundaries. However, if the coastal States are to have a right over the continental shelf, some principles for drawing the boundaries must be laid down. One possibility would for instance be that each State should have jurisdiction over that part of the continental shelf which is nearer to its own territory (including internal waters but excluding the territorial belt) than to the territory of any other State. Disputes as to how the principles should be applied, would have to be settled by the International Court of Justice or by arbitration.

In article 1 it is said that the term "continental shelf" refers to the sea-bed and subsoil of the submarine areas contiguous to the coast. What is precisely meant with the expression contiguous to the coast? There may be a stretch of deep water near the coast and areas of shal-

lows. This would for instance be the case outside the coast of Norway. Along the coast of southern and western Norway stretches a long and rather narrow belt of deep water. On the outer side of that narrow belt the North Sea as a whole is rather shallow with depths inferior to 200 metres. It would obviously be most unfair if Denmark, Germany, the Netherlands and the United Kingdom should share between them the whole North Sea, while Norway should be excluded because of the above-mentioned belt of deep water. If there are to be any rules governing the continental shelf, article 1 ought to be redrafted so that it is beyond doubt that the term "continental shelf" refers to the sea-bed and subsoil of the submarine areas lying off the coast, even if these submarine areas are separated from the coast by stretches of deep waters. The best thing would probably be not to use the term "continental shelf". In paragraph 1 of the commentaries to part I, article 1, it is stated that the term "continental shelf" as used in article 1 departs from the geological concept of that term. If it is necessary to give coastal States a right of control and jurisdiction for the purpose of exploring and exploiting the natural resources of the sea-bed and subsoil, the best thing would probably be to limit that right to a contiguous zone of a fixed breadth. It would be necessary to have provisions stating how the boundaries between the contiguous zones of several States should be drawn when the zones overlap.

Article 2 of part I of the draft articles seems to imply that the coastal State might exercise control and jurisdiction over the continental shelf in such a way as to exclude foreigners. As it has already been pointed out above, it is doubtful whether it is really necessary to give such a monopoly to nationals of the coastal State.

#### PART II. RELATED SUBJECTS

According to the existing rules of international law, a State is free to regulate and control the fishing activities of its own nationals on the high seas. Where the nationals of several States are engaged in fishing activities in an area, the States concerned may of course conclude an agreement between themselves in which they provide for measures binding on their respective nationals.

It is not clear whether article 1 of part II adds anything to these rules apart from the provision that a coastal State is entitled to take part in any system of regulation within 100 miles of its territorial waters even though its nationals do not carry on fishing in the area. The last sentence of article 1 seems however to indicate that one or more States may, in certain circumstances, take measures which are binding on the nationals of other States, provided no area is closed to them. The second sentence of the article, on the other hand, says that if the nationals of several States are engaged in an area, measures are to be taken by those States in concert. This seems to exclude the possibility of applying any measures to nationals of States which have not taken the measures in question, either alone or in concert with other States. Have the authors of the draft articles meant that if the nationals of a State fish only occasionally in an area they should be bound by measures taken by those States whose fishermen fish regularly in the same area, although their own State has not acceded to the measures? Or was it their intention to say that when all those States whose nationals fish in an area agree on certain measures, these meas-

The exact meaning of article 1 should be explained. In any case the article seems to require redrafting, so as to become more clear, if it should not be left out altogether.

There exists in several areas a great danger of over-fishing. In some areas, indeed, conservation measures are long overdue. The purpose of article 2 of part II therefore deserves great sympathy. It is doubtful however whether this article represents the best solution of the problem. It might prove very difficult, at any rate at the present time, to reach agreement among all interested States about the creation of the proposed permanent international body. Furthermore, an international body would probably not be the best agency for dealing with the various problems arising in different parts of the world. The most adequate means of reaching practical results in a not too distant future would be to continue to negotiate agreements between the interested States for the regulation of fisheries in particular areas. If such a procedure were to be followed, it would not be necessary to wait for the agreement of all fishing nations in the world, and it would also be possible to make agreements suited for the particular requirements of the different fishing areas.

According to paragraph 5 of the commentaries to part II, article 2, the International Law Commission has discussed a proposal that the coastal State should be empowered to lay down conservation regulations to be applied in a zone contiguous to its territorial waters. This idea might be given further consideration. It is possible—although not certain—that one ought to create contiguous zones in which the coastal States should have the right to regulate and control the exploitation of the resources of the sea as well as of the sea-bed and subsoil without, however, having the right to exclude foreigners from taking part in such exploitation. One ought of course in such a case to specify what sort of regulations are permitted in order to prevent the coastal States from making any abuse of their rights.

As already mentioned, it is difficult to understand why so-called sedentary fisheries should be treated in a different way than other fisheries. According to paragraph 1 of the commentaries to part II, article 3, the proposals in that article refer to fisheries regarded as sedentary because of the species caught or the equipment used, e.g., stakes embedded in the sea floor. The catching of fishes swimming in the sea requires regulations no less than the catching of species living on the bottom of the sea. The risk of overfishing exists in both cases. And conflicts between fishermen might arise whether they fish for species on the bottom or for species swimming between the bottom and the surface of the sea. When stakes are embedded in the sea floor, some regulation might be required to prevent the stakes being run over or damaged, but when nets or lines are anchored, the same need for regulation exists. The problems with which we are faced are how to prevent overfishing, conflicts between fishermen and destruction or damage to the equipment used by them. The solution of these problems would not be furthered by making a distinction between "sedentary" and other fisheries.

The proposals put forward in part II, article 4, seem reasonable. Some clarification, however, is needed on two points.

It ought to be made quite clear that the term "customs regulations" does not only mean regulations concerning

import and export duties, but also all other regulations concerning the exportation and importation of goods.

The word "coast" at the end of the article might lead to misunderstandings. Some people may interpret it as meaning the line where land ends and water begins. Others would find it more natural to interpret the word "coast" as including the seaward limit of the interior waters. It is suggested that the word "coast" be replaced by the expression "base lines from which the breadth of the territorial waters are reckoned". This would be a practical solution. It is indeed impossible to draw a line twelve miles at sea which follows all the sinuosities of an irregular coastline. Norway makes use of straight base lines drawn between the outermost points on land or on the island fringe (*skjaergard*) in the general direction of the coast. The judgment which the International Court of Justice delivered in the *Anglo-Norwegian Fisheries* case on 18 December 1951 made it clear that the Norwegian base lines system was not contrary to international law.

The contiguous zone which is proposed in article 4 must be distinguished from the contiguous zones which have been mentioned above and in which the coastal State might have the right to control the exploitation of the resources of the sea and of the sea-bed and subsoil. There is no reason why the contiguous zones which different States have established for customs, fiscal and sanitary purposes should not overlap. Such overlapping would render it easier to prevent smuggling. If contiguous zones should be established for the regulation of the exploitation of the natural resources of the sea and of the sea-bed and subsoil, such contiguous zones must of course never overlap.

## 12. PHILIPPINES

*Letter from the permanent mission of the Philippines to the United Nations*

[10 March 1952]

I have the honour . . . to reproduce herewith the following comments of the Philippine Government on the draft articles pertaining to the continental shelf and other related subjects:

In general, the text of the draft articles and commentaries thereon are well-drawn and well elucidated. The following comments on the various draft articles are submitted by the Bureau of Fisheries:

### I. Part I, article 1

Philippine territorial waters, in accordance with the provisions of Act 4003, as amended, are waters within the international treaty limits (Treaty of Paris of 10 December 1898; Treaty concluded at Washington between the United States and Spain on 7 November 1900; Agreement between the United States and the United Kingdom of 2 January 1930). The extension inside Philippine territorial waters of the Bornean shelf (in the geological sense) cannot therefore be considered continental shelf under this article but a submarine area inside Philippine territorial waters, and therefore subject to the sovereignty of the Republic of the Philippines.

### II. Part II, article 2

At present there is established in the Southwestern Pacific an international body, known as the Indo-Pacific Fisheries Council, under the auspices of the Food and

Agriculture Organization of the United Nations. Is this Council considered, under this article, a permanent international body upon which competence may be conferred? In the case of States not being able to agree among themselves, it may be stated that the Agreement which is the charter of this international body does not contain any provision referring to settlement of conflicts between member countries.

Regarding commentary No. 3 under the same article, this question is raised: In so conferring competence to the United Nations Food and Agriculture Organization or any of its regional councils, for instance, on matters regarding fishery disputes between coastal states, could this competence be honoured and its decision accepted as a judicial decision by the International Court of Justice? It is felt that conflicts may be referred to the International Court of Justice for decision and the power to make regulations or conservatory measures left to the Food and Agriculture Organization or its regional councils.

### III. Part II, article 3

It is desired that a clearer definition of the term "sedentary fisheries" be made. It is not definite whether fisheries for sponges, commercial shells, such as trochas, gold-lip pearl shells, black-lip pearl shells, et cetera, found on sea bottoms are considered as sedentary fisheries in the sense of this article. With reference to fishing gear, it is not also known whether fishing appliances placed or anchored on sea bottoms, as fish traps (weirs), fish pots, anchored floating traps and submarine trap nets are considered sedentary.

### 13. SWEDEN

#### *Letter from the Ministry for Foreign Affairs of Sweden*

[Original: French]  
[30 May 1952]

The draft articles on the continental shelf and related subjects prepared by the International Law Commission have been examined with the greatest interest by the Swedish Government: the draft was communicated to it by the Secretary-General in a letter dated 28 November 1951, which also asked for the Swedish Government's opinion.

This is a topic to which much attention has been devoted in recent years. Certain countries have made all kinds of claims varying in extent and differing in substance, based on various arguments, and these have involved departures from the rules of law hitherto accepted as part of the régime of the high seas. Such claims are bound to cause a great deal of uncertainty in a matter which is important for international communications and to entail the risk of disputes between States. It is undoubtedly desirable that generally acceptable international rules on this subject should be adopted. The Swedish Government was therefore glad to observe that among the questions being studied by the International Law Commission with a view to the codification of international law on this subject, priority has been given to the régime of the high seas.

The foregoing remarks refer especially to claims made by certain States in respect of submarine areas and in some cases also of a stretch of water extending well beyond territorial limits. It is true that in the past it has sometimes been proposed that a coastal State should acquire control of fishing above the continental shelf, but nothing has ever come of such proposals. In

certain particular instances, moreover, coastal States have exercised sovereignty over sedentary fisheries (pearl and oyster beds), but such cases, for which there is historical support, may be regarded as exceptions. The claims to control of the continental shelf and superjacent waters made after the Second World War must be considered as entirely new and, in the opinion of the Swedish Government, as having no foundation in existing international law. The Swedish Government was interested to note that in its comments on article 2 of the draft, the International Law Commission gives negative answers to the questions whether the continental shelf can be occupied and whether claims to sovereignty over it have any basis in international customary law. On the other hand, the Commission states that "the principle of the continental shelf is based upon general principles of law which serve the present-day needs of the international community". The Swedish Government is unable to reconcile these two views. Moreover, the Commission gives no particulars of the "general principles of law" to which it refers.

The Swedish Government feels bound to regard any proposal to grant rights over the continental shelf to coastal States as being *de lege ferenda* and considers that such a proposal could only be put into effect by an international convention providing for certain concessions to coastal States which are in a position to exploit the continental shelf. The conclusion of such a convention is a matter of expediency. It would depend on whether the reasons for granting such rights to coastal States were strong enough to persuade other States to accept a corresponding limitation of the rights they now enjoy by virtue of the principle of freedom of the seas.

The chief reason advanced for giving coastal States some degree of control and jurisdiction over the continental shelf is that exploitation of its natural resources would thus be made possible. The resources in question are for the most part minerals in general and petroleum in particular. It is necessary to grant control and even monopoly rights over the exploitation of these natural resources to coastal States, in order to prevent the development of chaotic conditions which would render any exploitation impossible. The world's need of those resources, especially petrol, should therefore be a sufficient reason for granting certain concessions to the coastal States even though this would entail sacrifices by other States.

The Swedish Government is prepared to admit that there is some justification for this argument. But if such concessions are granted to coastal States, it should be stipulated that their scope should not be wider than is absolutely necessary to achieve the aim in view, and that the rights now enjoyed by all States under the principle of freedom of the seas, especially rights of navigation and fishing in free waters, should be preserved and protected as far as possible.

On the basis of these considerations, the Swedish Government is of opinion that the provisions concerning the continental shelf proposed by the International Law Commission, as contained in part I of the draft, are fairly satisfactory in several respects.

In article 1, the Commission gives a definition of the continental shelf and points out that the geological concept of this term is unsuitable as a basis for the draft. It seems true to say that for purposes of regulation, the essential point is that the superjacent waters should be shallow enough to admit of exploitation of the

ures should be binding on newcomers from other States?

The exact meaning of article 1 should be explained.

natural resources of the sea-bed and subsoil, and not that the sea-bed should form a "plateau" or "shelf". This being so, the Swedish Government feels that it might be preferable to use some term other than "continental shelf", for instance "submarine areas".

Article 2 states that "the continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources". The Swedish Government thinks it proper that the rights of coastal States in respect of the continental shelf should be confined to the purposes stated. The claims to sovereignty, even over wide stretches of water extending far beyond the coast, which have been made by certain States, would thus be rejected. In the opinion of the Swedish Government, these claims are certainly not consistent with existing international law. It also follows that where there is no exploration or exploitation, the coastal State has no rights over the continental shelf, except the right to prevent its exploration or exploitation by others. It should be expressly stated that "natural resources" are understood to mean mineral resources, in order to show that fishing is not included. Moreover, "sedentary fisheries" are dealt with in another article of the draft.

The Swedish Government approves of the provisions of articles 3 and 4, namely, that the exercise by a coastal State of control and jurisdiction over the continental shelf must not affect the legal status of the superjacent waters or of the airspace above them.

The Swedish Government considers that the proposed provisions of article 6 are likely to cause some anxiety, since they appear to encroach, to some extent, on the principle of freedom of the seas. As already pointed out above, the granting of rights over the continental shelf to coastal States should be conditional upon the rights of navigation and fishing in free waters, which belong to all States, being restricted as little as possible. The Swedish Government cannot help feeling that this stipulation has not been adequately formulated in the proposed text of article 6. To say that "the exploration of the continental shelf and the exploitation of its natural resources must not result in substantial interference with navigation or fishing" does not appear to provide a guarantee in this matter. Precise rules should be drawn up concerning notification and warnings, particularly in regard to the question of the parties to be notified. In any case, it will be necessary to ensure that notice is given before installations are constructed. With a view to the safety of shipping, it will also be necessary to draw up rules on the equipment of installations. An obligation to pay compensation for damage resulting from negligence or carelessness on the part of the exploiter should also be created.

The Swedish Government considers that in some respects the most strikingly novel feature of the draft is the provision in article 6, paragraph 2, regarding the establishment of safety zones around installations. This provision undoubtedly departs from existing rules of law on the freedom of the seas. It may be asked whether coastal States will acquire the right to stop and punish ships entering navigable waters to which they now have an undisputed right of access. The provision on safety zones should give details both of their nature and of their extent. In its comments, the Commission states that a radius of 500 metres would generally be sufficient. If that is so, this figure should be included in the text of the future convention.

In article 7 of the draft, the Commission deals with

import and export duties, but also all other regulations concerning the exportation and importation of goods.

The word "coast" at the end of the article might lead

the need for boundaries between areas of the continental shelf belonging to States to whose territories the same continental shelf is contiguous. It may be expected that the fact of granting coastal States a monopoly of exploitation of the natural resources of the continental shelf will give rise to disputes between the States concerned. In such cases submission to arbitration should presumably be compulsory. The Swedish Government is not convinced of the advisability of arbitration *ex aequo et bono*. It is most desirable that rules of law on which arbitrators can base their decisions should be drawn up. Practice between States and previous arbitration cases may possibly provide useful material for the drafting of such rules of law. In this connexion, the Swedish Government wishes to draw attention to The Hague Arbitral Award of 1909 on the Maritime Frontier between Sweden and Norway.

In part II of its draft, the Commission deals, under the heading "Related subjects", with various questions concerning the régime of the high seas.

Articles 1 and 2 relate to measures for conservation of the resources of the sea. The Swedish Government considers this a difficult but important task. Under present conditions there is great danger of these resources being destroyed by over-intensive fishing and hunting. The difficulty is that even if a convention on measures for the protection of marine fauna were concluded between the States mainly interested, it would not be binding on non-acceding States. As international law now stands, it is hard to see how this difficulty could be overcome. A coastal State clearly has no right to prohibit or regulate fishing beyond the limits of its territorial waters. The method proposed by the Commission, which appears to be that a general convention should empower the States mainly concerned to take measures binding on other States as well, may perhaps be practicable. Here, it must be clearly laid down that such measures may in no case result, either directly or indirectly, in the exclusion of nationals of other States from participation in fishing or hunting. From this point of view an international body, to which complaints could be submitted regarding the measures taken, appears to be essential.

Article 3 deals with "sedentary fisheries". The Swedish Government has already outlined its views on this matter. There are probably certain sedentary fisheries (pearl and oyster beds) over which coastal States have exercised exclusive sovereignty *de facto* for a long time. This is a matter of special cases rather than a general rule. In such cases, where the rights of a coastal State have a historical foundation, the basic principles of international law would hardly permit them to be impaired by a convention concluded in our time. It seems scarcely necessary to discuss this question, except perhaps with a view to formulating a reservation of such rights to be inserted in article 1 of part II. A special article on sedentary fisheries would then be unnecessary.

In article 4, the Commission deals with the question of a contiguous zone beyond territorial waters, within which a coastal State would have the right to exercise "the control necessary to prevent the infringement . . . of its customs, fiscal or sanitary regulations". As we know, this question has been keenly debated, especially at The Hague Conference of 1930, when a number of States laid claim to contiguous zones of this kind. These claims were no doubt made *de lege ferenda* rather than by virtue of the existing law. The Swedish Government is aware that certain States have established contiguous

zones, particularly for customs control, by unilateral legislative action. But it has grave doubts as to whether a coastal State has the right to exercise control over foreign ships outside its territorial waters, without the consent of the country to which such ships belong. These doubts are confirmed by the fact that States desiring to exercise such control have often thought fit to conclude treaties to secure this right. Reference may here be made to the so-called "liquor treaties" concluded by the United States in 1924-1926 and the treaty concluded at Helsinki in 1925 between the coastal States on the Baltic Sea. Moreover, this question is so closely bound up with that of the extent of territorial waters, which is already on the Commission's work programme, that it would seem advisable to deal with the two topics at the same time.

Generally speaking, all the subjects dealt with in the Commission's draft raise the same problem: it is difficult to form a final opinion on them before knowing how the question of the extent of territorial waters is to be settled internationally. In this connexion, the Swedish Government wishes to stress its view that none of the interests which the draft is designed to safeguard, be it the exploitation of the resources of the continental shelf, the conservation of the resources of the sea or any other interest, should serve as a pretext for extending territorial waters beyond the traditionally accepted limits.

#### 14. SYRIA

*Letter from the Minister for Foreign Affairs of Syria*  
[Original: French]  
[20 July 1952]

In reply to your letter No. LEG.292/1/07 of 28 November 1951, in which you were good enough to ask for the comments of the Syrian Government on the draft articles on the continental shelf and related subjects which the International Law Commission was requested to prepare, I have the honour to inform you that these articles have been approved, in principle, by the competent authorities of Syria.

Moreover, in view of the importance to Syria of the problem of preserving the resources of the sea, the proposal contained in part II, article 2 of the above-mentioned draft, concerning the establishment of a permanent international body to conduct continuous investigations of the world's fisheries and the methods employed in exploiting them, has been favourably received.

#### 15. UNION OF SOUTH AFRICA

*Comments of the Government of the Union of South Africa transmitted by a note verbale dated 27 August 1952 from the permanent delegation of the Union of South Africa to the United Nations*

##### PART I. THE CONTINENTAL SHELF

###### Article 1

The Union Government feel that the definition of the continental shelf as "the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil", is too elastic. If the test is to be the "exploitability" of the sea-bed and subsoil then it seems clear that with the advance of technical proficiency in working at increas-

ing depths, the boundaries of the continental shelf must be subject to continual revision. This would tend to import into the law an element of uncertainty which would be inimical to the orderly development and exploitation of the continental shelf.

On the other hand, the Union Government recognize that a rigid definition of the continental shelf in terms of the depth of the superjacent waters may also be unsatisfactory in that whatever depth is decided upon must be arbitrary and may in the course of time, and through the advance of technical knowledge, cease to bear any relation to the needs and capacities of the littoral State. In the circumstances, the Union Government would prefer to see the continental shelf defined in terms of a maximum depth of 200 metres; but feel that provision should be made for reviewing this depth at some future date, should technical considerations render such a review necessary.

###### Article 2

The Union Government would prefer to see the word "sovereignty" used in place of the phrase "control and jurisdiction for the purpose of exploiting . . ." in the Commission's draft. There appears to be no good reason for distinguishing between the nature of the right which a State possesses in relation to territorial waters and the right now in process of being recognized in relation to the continental shelf. Moreover, the phrase used in the Commission's draft is ambiguous, since the words "control", "exploring", "exploiting" and "natural resources" are all open to interpretation. The word "sovereignty", on the other hand, has a clear connotation in international law and appears to describe very adequately the relationship which the littoral State will bear to the continental shelf.

The right of foreign States to lay cables on the continental shelf is safeguarded in the draft articles and will not, therefore, be affected by the exercise of sovereignty in other respects.

###### Articles 3-5 inclusive

The Union Government concur.

###### Article 6

The Union Government are inclined to favour express provisions for a safety zone of 500 metres round installations on the continental shelf. It is felt that the phrase "reasonable distance" is uncertain and may give rise to disputes.

###### Article 7

While entertaining no very strong views on the relative merits of arbitration and judicial settlement of disputes which may arise from the inability of littoral States to agree upon boundaries in the area of the continental shelf, the Union Government would prefer an express stipulation in favour of the latter. It is felt that judicial settlement of disputes which may arise is more likely to contribute to the orderly development of international law than is the creation of a network of *ad hoc* arbitral awards based upon political rather than legal considerations.

##### PART II. RELATED SUBJECTS

###### Resources of the sea

###### Article 1

The Union Government concur with the first, second and fourth sentences of the draft article, but consider

that the third sentence, which reads "If any part of an area is situated within 100 miles of the territorial waters of a coastal State, that State is entitled to take part on an equal footing in any system of regulation, even though its nationals do not carry on fishing in the area", is superfluous and contains an implied derogation from the principle of the freedom of the high seas. It flows necessarily from this principle that it is contrary to international law to prevent or even regulate fishing by the nationals of a foreign state in any area of the high seas, except with the agreement of that State.

#### Article 2

The Union Government concur with the body of the draft article but are strongly opposed to the suggestion contained in note 5 of the comments, which is to the effect that, pending the establishment of a permanent international body, coastal States should be empowered to lay down conservatory regulations in a zone contiguous to their territorial waters. The Union Government consider that to permit coastal States to enforce conservatory regulations against the nationals of other States outside the limit of territorial waters, and without the consent of those States, would be to allow a serious derogation from the freedom of the high seas.

The Union Government consider that apart from the Food and Agriculture Organization mentioned in paragraph 3, the International Council for the Exploration of the Seas (ICES) should also be consulted.

#### *Sedentary fisheries*

#### Article 3

The Union Government concur.

#### *Contiguous zones*

#### Article 4

The Union Government regard the article as being reasonable provided that it is strictly interpreted. The control and jurisdiction of the littoral State for the purpose of this article should not go beyond what is necessary to prevent the infringement, within its territorial waters, of customs, fiscal or sanitary regulations; and in no case should it be exercised beyond the twelve-mile limit.

#### 16. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

*Comments of the Government of the United Kingdom transmitted by a letter dated 2 June 1952 from the permanent delegation of the United Kingdom to the United Nations*

In the opinion of Her Majesty's Government the draft articles on the continental shelf and related subjects contained as an annex to chapter VII (Régime of the High Seas) of the report of the International Law Commission covering its third session, are a credit to the Commission and a valuable contribution towards the codification of the law of the sea. Her Majesty's Government's comments on the draft articles are annexed, but a few general observations are given below. Her Majesty's Government note that at its second session the Commission decided to proceed to the codification of the law of the sea by stages and that at its third session it decided to initiate work on the régime of territorial waters. In the opinion of Her Majesty's Government, the questions of the régime of the high seas and of the régime of territorial waters have now

tended to become so interconnected that, at this stage of the Commission's work, it is not possible for governments to express more than tentative comments. Her Majesty's Government will await, however, with very great interest the Commission's report on the régime of territorial waters and hope to be able to offer more extended comments thereafter.

Her Majesty's Government also note that at its second session the Commission thought it could, for the time being, leave aside all those subjects falling for study by other United Nations organs or by the specialized agencies. Her Majesty's Government consider this was a wise decision as enabling the Commission generally to concentrate on the task of codifying the existing law, whilst leaving to other United Nations organs or the specialized agencies the task of initiating studies in matters not yet regulated by international law, such as fishery conservation outside territorial waters and pollution.

As Her Majesty's Government understand it, it is the task of the Commission to "codify" the régime of the high seas. "Codification" was defined by the Committee on the Progressive Development of International Law and its Codification as meaning "the more precise formulation and systematization of the law in areas where there has been extensive State practice, precedent and doctrine" (A/AC.10/51).

In the opinion of Her Majesty's Government, State practice in regard to the subjects treated by the Commission has, notwithstanding certain gaps, been sufficiently developed to justify the attempt to prepare a code. While they must observe that, in their view, some of the rules adumbrated by the Commission in its draft are not at present rules of customary international law, Her Majesty's Government do not propose to criticise them destructively on this account. Where, however, it appears that the rule suggested is based on so little practice as to amount to a mere recommendation, it is indicated in the annex whether or not Her Majesty's Government consider the recommendation acceptable in principle, whilst reserving the right to reconsider the matter in the light of the replies of other governments.

#### ANNEX TO THE COMMENTS BY THE GOVERNMENT OF THE UNITED KINGDOM

##### PART I

##### Article 1

Suggested amendment: Delete "where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil" and substitute "as far as the 100-fathom line".

*Comment.* Her Majesty's Government agrees that, whatever the precise geological meaning of the term "continental shelf", this term should continue to be used in international law to cover those submarine areas over which the coastal State (which may be an island as well as a State forming part of a "continent") is entitled to exercise sovereignty.

Her Majesty's Government consider, however, that the definition adopted by the Commission of "continental shelf" in the legal sense is too vague and is susceptible of abuse.

The formula "Where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil" might easily provoke international disputes. Just as in the case of the superjacent waters it became necessary to establish a fixed limit of distance for the extent of the territorial sea, so in the case of the sea-bed and subsoil it is essential from the practical point of view to establish a fixed limit of depth for the extent of the continental shelf under the sovereignty of the coastal State.

Her Majesty's Government consider that State practice is sufficiently uniform to justify fixing this limit at the 100-fathom line. Consequently, in the view of Her Majesty's Government, every State is entitled to exercise sovereignty over the sea-bed and subsoil off its coasts as far as the first point at which the depth of the water becomes 100 fathoms, regardless of the fact whether this sea-bed and subsoil constitute a continental shelf in the geological sense or not.

Her Majesty's Government sympathize with the desire of the Commission to establish a more flexible limit, so as not to preclude the possibility of exploitation, when that becomes technically feasible, beyond the 100-fathom line. In their view, however, the 100-fathom line is likely to be sufficient for all practical purposes for some time to come and, if practical considerations ever necessitated a greater depth, the matter could be reconsidered later. Although a flexible limit might have some advantage, it would seem preferable on balance to secure as soon as possible international agreement on a fixed depth. Her Majesty's Government might be prepared to consider 200 metres as an alternative to 100 fathoms<sup>22</sup> but they wish to place on record their opposition to any system which would allot the continental shelf to coastal States on the basis of distance rather than depth and which would allot to coastal States submerged plateaux (themselves possibly less than 100 fathoms below the water) separated from the coast by a channel more than 100 fathoms deep. In the opinion of Her Majesty's Government, such submerged plateaux are either *res communis* capable of acquisition by prescription or *res nullius* capable of occupation and exploitation by any State according to the normal law of occupation. Her Majesty's Government regard as illegal certain claims that have been made over the continental shelf on the basis of distance rather than depth.

#### Article 2

Her Majesty's Government would prefer to say that "the continental shelf is subject to the sovereignty of the coastal State". In the opinion of Her Majesty's Government there is no sufficient reason for substituting for the familiar concept of "sovereignty" the new and undefined expression "control and jurisdiction", even though the two expressions are probably intended to have the same meaning. If the expression "sovereignty" were used, there would be no doubt that a crime committed in a tunnel under the continental shelf would come within the jurisdiction of the coastal State; if the expression "control and jurisdiction for the purpose of exploring the continental shelf and exploiting its natural resources" were used, there might be some doubt on this point.

In the opinion of Her Majesty's Government the rights of the coastal State over the continental shelf are of the same nature as its rights over its land territory, and it would be desirable to state this precisely in the draft.

Her Majesty's Government agree that it is for the time being impracticable to develop submarine areas internationally; that the continental shelf is not *res nullius*; and that the right to exercise sovereignty over the continental shelf is independent of the concept of occupation.

#### Article 3

Her Majesty's Government are entirely in favour of this article and would not be prepared to accept any convention on the continental shelf which did not contain such an article.

#### Article 4

As for article 3.

#### Article 5

As for article 3.

Her Majesty's Government agree that the pipeline question need not be considered for the time being.

#### Article 6

Her Majesty's Government agree in principle to this article. They believe, however, that the Commission's recommendation

<sup>22</sup> The advantage of the 100 fathom line is, however, that it is shown on most ocean-going charts, whereas the 200 metre line is not shown on these charts.

of a 500-metre navigational safety zone should be written into the body of the article in place of the rather vague formula "to reasonable distances".

#### Article 7

While attaching great importance to the principle that international disputes should be settled by judicial methods, Her Majesty's Government are unable to agree to this article in its present form. In particular they cannot accept the recommendation that States should be under an obligation to submit such disputes to arbitration *ex aequo et bono*. They consider that such disputes should be solved by "judicial settlement" rather than by "arbitration in the widest sense" and they consider that the Commission might draw up a system of rules to regulate the division of the continental shelf in congested areas, in cases where it has been impossible to reach agreement. These rules might form the basis of treaties between States, and in any case, provided they took account of international practice to date, they would be of the greatest value to international judicial tribunals seized of disputes of this type.

### PART II

#### Article 1

Her Majesty's Government are in general sympathy with the objects of this article. In their view, the first, second and fourth sentences contain statements of existing international law, whilst the third sentence is a recommendation *de lege ferenda*. Whilst they understand the reasons for which the Commission put forward this recommendation, Her Majesty's Government nevertheless consider it superfluous and probably unworkable in practice. It is implicit in the very notion of the high seas—as the Commission realized in drafting the fourth sentence of the article—that it is contrary to international law to prevent or even to regulate fishing by the nationals of a foreign State in any area of the high seas except with the agreement of that State. From this basic principle it follows, in the opinion of Her Majesty's Government, that any State which claims an interest in the fishing in a particular area of the high seas is entitled to take part on an equal footing in any system of regulating the fishing in that area, whether it is more or less than 100 miles away from that area and whether its nationals are or are not at present engaged in fishing in that particular area.

#### Article 2

Her Majesty's Government agree that the question of setting up a permanent international body to conduct investigations of the world's fisheries is within the competence of the Food and Agriculture Organization and that pollution is within the competence of the Economic and Social Council and will eventually be dealt with by the Inter-governmental Maritime Consultative Organization.

Her Majesty's Government wish to place on record their emphatic opposition to the proposal contained in note 5. In the opinion of Her Majesty's Government no State has the right to enforce conservation measures against the fishing vessels of other States outside its territorial waters except by international agreement. Unilaterally declared conservation zones outside territorial waters are illegal as being in contravention of the principle of the freedom of the seas.

#### Article 3

As stated in the comments on article 1 of part II, Her Majesty's Government consider that, as a matter of general principle, no State is entitled to regulate fishing by the nationals of other States in areas of the high seas except by agreement with the States concerned. In their opinion, however, international law recognizes an exception to this general rule in cases where the coastal State has acquired, on the basis of prescription, sovereignty over sedentary fisheries lying on the sea-bed which have long been carried on exclusively by its nationals, even though the area where the sedentary fisheries are carried on may be outside territorial waters. The legal basis underlying prescriptive claims of this type was examined by Sir Cecil Hurst in a well-known article entitled, "Whose is the bed of the sea?" (*British Year Book of International Law*, 1923-24, page 34), in

which the learned author concluded that these claims are valid provided they conform to certain conditions, namely

(i) The coastal State must have exercised effective occupation of, and jurisdiction over, the sedentary fisheries on the sea-bed for a long period.

(ii) There must be no interference with freedom of navigation in the waters above the sea-bed.

(iii) There must be no interference with the right to catch swimming fish in the waters above the sea-bed.

Her Majesty's Government consider that the law was correctly stated by Sir Cecil Hurst in the above article and they are in entire agreement with the author's conclusion that "the claim to the exclusive ownership of a portion of the bed of the sea and to the wealth which it produces in the form of pearl, oysters, chanks, coral, sponges or other *fructus* of the soil is not inconsistent with the universal right of navigation in the open sea or with the common right of the public to fish in the high seas".

In drafting this article, the Commission would appear on the whole to have shown a similar agreement with the conclusions of Sir Cecil Hurst. Her Majesty's Government note, however, that the Commission would make the right to regulate sedentary fisheries outside territorial waters subject to the requirement that non-nationals be "permitted to participate in the fishing activities on an equal footing with nationals". In the opinion of Her Majesty's Government, it depends on the historical facts of each case whether or not non-nationals are permitted to participate in the fishing activities on an equal footing with nationals. Where the coastal State has in the past permitted non-nationals to participate in the fishing, then there is no right to exclude such non-nationals in the future; where, however, the coastal State has in the past reserved the fishing exclusively for its own nationals, then non-nationals have no right under international law to participate in the fishing in the future. Further, it may be a nice doctrinal point whether a State, which has (a) a title by prescription to sedentary fisheries lying on the sea-bed, has also (b) a title to the surface of the sea-bed on which the sedentary fisheries lie. The distinction, if there is one at all, between (a) and (b) must be a fine one, yet it seems that this distinction is the basis of the distinction which the Commission makes in note 1 between sedentary fisheries on the one hand and the continental shelf on the other hand. In any case the basic distinction must be that between the sea-bed (sedentary fisheries or continental shelf) over which the coastal State is entitled in appropriate circumstances to full sovereignty and the superjacent waters over which the coastal State is not entitled in any circumstances to sovereignty. The Commission has (in articles 3 and 4 of part I) emphasized this distinction in the case of the continental shelf; it does not appear, however, to have stressed it with due clarity in the case of the sedentary fisheries.

#### Article 4

It has hitherto been the policy of Her Majesty's Government to oppose any claims to the exercise of jurisdiction outside territorial waters. Many countries have, however, claimed to exercise jurisdiction for certain limited purposes beyond territorial limits. For the most part these purposes have related to the enforcement of customs, fiscal or sanitary regulations only and the jurisdiction has been exercised within modest limits, generally within a "contiguous zone" not more than twelve miles from the coast. Her Majesty's Government have not themselves found it necessary to claim a contiguous zone, and wish to place on record their emphatic opposition as a matter of principle to any increase, beyond limits already recognized, in the exercise of jurisdiction by coastal States over the waters off their coasts, whether such increase takes the form of the extension of territorial waters or the exercise of wider forms of jurisdiction outside territorial waters. Her Majesty's Government are satisfied, however, that on the basis of established practice, the article proposed by the Commission is acceptable provided that:

(i) Jurisdiction within the contiguous zone is restricted to customs, fiscal or sanitary regulations only.

(ii) Such jurisdiction is not exercised more than twelve miles from the coast.

(iii) This article is read in conjunction with another article stating that the territorial waters of a State shall not extend more than three miles from the coast unless in any particular case a State has an existing historic title to a wider belt.

Her Majesty's Government would observe that the term "coast" is ambiguous. The Commission should declare whether it is the physical coast-line that is envisaged or the political coast-line i.e., the base line from which the territorial sea is delimited.

### 17. UNITED STATES OF AMERICA

*Comments of the Government of the United States of America transmitted by a note verbale dated 29 May 1952 from the permanent mission of the United States to the United Nations*

The Acting Representative of the United States of America to the United Nations . . . has the honor to refer to note LEG.292/1/07, dated 28 November 1951, from the Office in Charge of the Legal Department, concerning the request of the International Law Commission for comments on the draft articles on the continental shelf and related subjects.

The Acting Representative of the United States has the honor to inform the Secretary-General that it is the understanding of this Government that the purpose of these comments is to facilitate reconsideration of the draft by the Commission prior to the preparation of a final document. For this purpose, the Government of the United States is in general agreement with the principles which appear to inspire the draft articles of part I, Continental Shelf, but has the following suggestions to make.

This Government is under the impression that the draft articles in part I, Continental Shelf, intend to establish in favor of the coastal State an exclusive right to the exploration of the continental shelf and the exploitation of its resources. This Government wonders, accordingly, whether it would not be advisable to make it clear, at least in the commentaries, that control and jurisdiction for the purpose indicated in the draft articles mean in fact an exclusive, but functional, right to explore and exploit. It is also the view of this Government that article 5 does not carry out precisely enough its purpose which, as stated in the commentary, is to bar the coastal State from excluding the laying or maintenance of submarine cables. As it stands, article 5 appears to imply that the coastal State may do so if the measures resulting in such exclusion are reasonable. The matter, it is believed, deserves clarification.

In addition, this Government does not believe that it is advisable to limit the scope of judicial arbitration by defining it as arbitration *ex aequo et bono*, as suggested in the commentary to article 7.

The Government of the United States is not prepared to submit comments at this time on part II, Related subjects, and will endeavor to communicate them to the Commission at a later date.

### 18. YUGOSLAVIA

*Comments of the Government of Yugoslavia transmitted by a letter dated 11 March 1952 from the permanent mission of Yugoslavia to the United Nations*

As a principle, the Government of the Federal People's Republic of Yugoslavia accepts the idea of estab-

lishing the "continental shelf" under which the coastal States would have certain specified rights and duties. It also expresses its recognition to the International Law Commission for its endeavours in this regard. As to the details, however, the Government of the Federal People's Republic of Yugoslavia does not agree with some provisions of the said draft and wishes to make the following suggestions.

#### PART I. CONTINENTAL SHELF

The Yugoslav Government considers that the solution of these problems as regards the continental shelf would be founded on a much more sound basis if this question were to be settled simultaneously with a uniform delimitation of marginal waters which compose the notion of coastal sea, i.e., of interior waters and territorial waters. This is because the question of width of each kind of marginal waters has not been settled uniformly as yet, and because a further area, i.e., the continental shelf, is now being added to these already unprecise borders (which are a source of frequent misunderstandings and protests).

##### Article 1

The Yugoslav Government does not share the opinion of the Commission laid down in point 7 of its commentary to article 1. Considering the rapid technical progress in the world it is evident that the technical possibilities of exploitation of the sea-bed and subsoil will grow very rapidly and the limit of the continental shelf, mentioned in article 1, will continually be shifted to greater depths in the high seas, hence, it will never be certain to what distance from the coast the continental shelf of a State extends. In order to give its full "*raison d'être*" to article 1 of the Commission's draft, it would be necessary to learn up to what depth the extraction of oil is possible today. (This is important because of article 7 of the draft, where a division of the continental shelf under mutual agreement is provided). However, we are not certain of this. At present it seems that this is possible only in depths up to 29 metres, but we understand that in the United States of America an equipment has been developed enabling extraction even in a depth of 300 metres. Tomorrow, maybe, devices will be found to extract oil in depths of 1,000 metres.

From the aforementioned it is evident that article 1, due to its lack of precision, can lead to misunderstandings among neighbouring countries. Hence, the Yugoslav Government considers as far more acceptable the proposition of Mr. El Khouri (who proposed a minimum boundary "X" miles from the coast, regardless of the depth, and a maximum boundary "X" metres of depth regardless of the distance from the coast), than article 1 of the draft. Therefore, the Yugoslav Government insists that the boundary of the continental shelf should be changed in the manner to determine as continental shelves all areas of sea-bed and subsoil covered by water not deeper than 200 metres.

##### Article 2

No objections.

##### Articles 3 and 4

Since these two articles cover the same subject, the Yugoslav Government considers that they should be joined into one article with two paragraphs. The second paragraph, dealing with the infringement of the

legal status of the area of the continental shelf, should be amended as follows:

"... subject to the right of the coastal state defined by article 6, paragraph 2."

Overflying below a certain height should be prohibited, in order to protect the already existing installations.

##### Article 5

No objections. Laying of pipelines should be prohibited.

##### Article 6

No objections. We agree with point 4 of the commentary to this article, with the remark that a safety zone over the installation to a height of 500 metres should be provided.

##### Article 7

Here the Yugoslav Government makes two observations. First, if article 1 of this draft remains unchanged, article 7 is inadmissible. Since neighbouring countries do not know to what distance their continental shelves can extend, because technical possibilities of extraction of oil will be different in two countries not equally industrially developed, they will not be able to establish the boundaries mentioned in article 7. Second, the Yugoslav Government considers the geometric middle the best way to apply in establishing boundaries, and it proposes to amend article 7 in this sense.

#### PART II. RELATED SUBJECTS

##### A. Resources of the sea

As a principle, the Yugoslav Government accepts the draft articles 1 and 2 with the following observations:

(a) Articles 1 and 2 are too concise and they therefore require numerous comments, which actually have been successfully prepared by the Commission. Therefore, in consideration of the Commission's remarks Nos. 2-5 to article 2 of the draft, the Yugoslav Government proposes that two or three additional articles should be drafted on the basis of these comments, in order to include the observations of the Commission.

(b) Considering that FAO is already dealing with these and similar problems, the Yugoslav Government insists that FAO should be the respective international body mentioned in article 2, in the form that this body has already been constituted within the said organization, consisting of a number of FAO members.

##### B. Sedentary fisheries

##### Article 3

No objections.

##### C. Contiguous zones

##### Article 4

The Yugoslav Government cannot at all agree with the formulation of this article, because it takes no account of the legitimate defensive rights of the coastal States. The establishment of this zone without authorizing the coastal State to protect the security of its shores in strictly limited and exactly specified scopes, is untenable in the view of the Yugoslav Government. This question and the *pro et contra* reasons have been thoroughly discussed at The Hague Codification Con-

ferable in 1950, so that it would be unnecessary to repeat them now.

shall not be exercised further than twelve miles from the outer limit of its interior waters."

Article 4 should, therefore, read as follows:

"On the high seas adjacent to its territorial waters, a coastal State may exercise the control necessary to prevent the infringement, within its territory or territorial waters, either of its customs, fiscal and sanitary regulations, or its security laws. Such control

In view of the fact, that interior waters, which otherwise are under the full sovereignty of the coastal State, are considered as an integrant part of its land, there is no difference between the Commission's and the Yugoslav proposal for the delimitation of this zone. The Yugoslav proposal is only more concise and will avoid arbitrary interpretations concerning the edge of the contiguous zone.

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